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No. 109.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No.

THE ATLANTIC TRUST COMPANY,
Petitioner,

versus

EDGAR C. CHAPMAN, Receiver of THE WOODBRIDGE CANAL AND IRRIGATION COMPANY ET AL.

Petition for Writ of Certiorari.

EDWARD B. WHITNEY,
STANLEY W. DEXTER,
Of Counsel.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE ATLANTIC TRUST COMPANY,
Petitioner,

VERSUS

EDGAR C. CHAPMAN, Receiver of the Woodbridge Canal and Irrigation Company, *et al.*

No. .

Petition for Writ of Certiorari.

The Atlantic Trust Company, the petitioner, respectfully presents to this Court this its petition for a writ of *certiorari* addressed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court and the Clerk thereof to certify to this Court the record and proceedings wherein this petitioner is appellant and Edgar C. Chapman Receiver of the Woodbridge Canal and Irrigation Company and others are appellees, and to certify therewith the opinion of said Circuit Court of Appeals therein, in order that the said cause may be reviewed and determined by this Court, as provided by law.

Due notice of this application has been given to all appellees who appeared in the Court below.

Statement of Facts.

This was a foreclosure suit. The Atlantic Trust Company, the petitioner, was complainant as Trustee for bondholders. The Woodbridge Canal and Irrigation Company was defendant. Edgar C. Chapman was appointed Receiver by the Circuit Court for the Northern District of California. Various intervenors were subsequently admitted as defendants. A decree of foreclosure and sale was duly entered after nearly three years of vexatious litigation with these intervenors. Meanwhile, owing to the delays and unforeseen disasters hereinafter set forth, the defendant's property so depreciated in value that it did not sell for enough under the decree to pay the Receiver's expenses and certificates. After the time for appeal from the decree had expired the Receiver for the first time set up a claim that this complainant was personally liable for the deficit; and petitioned for a personal decree against it. Complainant demurred to the petition and on this demurrer it was dismissed by MORROW, J., on the authority of 31 Oregon, 237 (see appendix). The Receiver then appealed to the Circuit Court of Appeals for the Ninth Circuit, which reversed the dismissal, disapproved the Oregon case and held the complainant liable for the full amount (Chapman vs. Atlantic Trust Company, 119 Fed. Rep., 257).

Complainant then petitioned this Court for a writ of *certiorari*. Although a brief was filed by some of the leading counsel of the City of New York, headed by the late Wheeler H. Peckham, asking the Court to take the case and decide it, the petition was denied (188 U. S., 741). It was the belief of the undersigned and of these intervening counsel, although without any information upon the subject other than was afforded by the record, that the petition was denied either because of certain defects in the record, or because the Court did not consider the decree as final; for cer-

tainly there was never a decision of more startling novelty, or more squarely opposed to the existing authority upon the subject.

This complainant then answered the petition upon the merits, denying some of its allegations and setting up a considerable number of new and affirmative defenses. The Receiver thereupon moved for judgment as upon bill and answer. By this motion he, of course, abandoned all of his allegations which were not admitted, and at the same time admitted the truth of all of the affirmative allegations interposed by us (2 Wheat., 380, 384; 112 U. S., 405, 409; 128 U. S., 244, 251; 160 U. S., 247, 257; 65 Fed. Rep., 690; 71 Fed. Rep., 576, 577; 1 Daniell Ch. Pl. and Pr., 829).

His petition will be found at pages 225-39 of the present record, and the answer at pages 255-84 thereof. The consent that the case be heard as upon bill and answer is at page 289. The Court upon the hearing took judicial notice of certain of its records, as requested by this complainant. The records so noticed are recited in its judgment at page 300 and appear in the record upon appeal. They had been incorporated in the answer by reference, and were also independently noticeable under the practice of the Court (141 U. S., 240, 243; 150 U. S., 31, 38; 168 U. S., 124, 129; 169 U. S., 39; 17 Am. & Eng. Cycl. of Law, 925) which practice was followed by consent in the present case. The net result was a personal judgment against this complainant for the sum of $36,207.57, with interest at seven per cent. and costs (pp. 303-4).

The case as thus now presented to the Court is in brief as follows:

The suit was to foreclose an ordinary trust mortgage, was conducted in the customary way, without any bad faith or collusion whatever and the Receiver was appointed by the Court on the usual application (pp. 261-3). It proceeded to a decree which was in all respects favorable to complainant, except that it admitted certain intervenors to participate in the benefits of the sale (pp. 170-212). The final decree of fore-

closure and sale contained no adjudication that the complainant was in any way responsible for any part of the Receiver's expenses, certificates or compensation, *and it reserved no power to the Court to modify it at any time after the confirmation of the sale thereunder;* nor did it reserve a right to modify in any particular except as to the upset price, the manner of sale, and the items of property to be sold (p. 212). The alleged reservation of jurisdiction noted in the opinion of the Circuit Court of Appeals was contained only in a supplementary order or decree confirming the sale (pp. 213–222).

There was great difficulty in making a sale, and the *decree or order of confirmation* was not entered until nearly a year after the decree of foreclosure. This so-called *decree of confirmation* provided that the Receiver should thereafter render his account to the Court, and that the Clerk should report the deficiency for its further consideration and action; and *purported to retain jurisdiction* of the cause and parties until the coming in of such reports and final action of the Court thereon, and payment of the balance of the costs and expenses of the proceeding, and of the advances and indebtedness of the Receiver or until the further and final order of the Court (pp. 221–2). The Receiver waited almost another year before filing his report (pp. 225–39), and did not raise his present contention, that the complainant was personally liable for the deficiency, for fifteen months (pp. 240–1).

The affirmative allegations of the answer show that the complainant was in nowise responsible for the delays incident to the proceeding, or for any of the misfortunes which caused its disastrous result. *The delays* were caused by litigation instituted by intervenors, in which litigations the complainant was largely successful, although to some extent the intervening petitions were granted; but at all times proceedings were pending, the defense to which was justified by subsequent success, and which necessitated a postponement of the entry

of the final decree of foreclosure (Answer pp. 265–70; Clerk's Docket, pp. 161–9; opinions at 79 Fed. Rep., 39, 842; 86 *Id.*, 975). *The disasters* were due to the giving way to the main dam, owing to hidden defects in construction. So far as any human being can be charged with any responsibility therefor, it is the Receiver himself and his agents (pp. 270–6).

The Receiver's certificates were issued by order of the Court on petition of the Receiver, and largely for repairs which afterwards turned out to be useless, owing to the fact that the Receiver was not properly advised by the agents whom he had selected, one of whom, by an irregular and unauthorized act, he had taken upon the nomination of the farmers of the vicinity (pp. 272–6; Receiver's Reports, pp. 42–56, 60–2, 71–5, 147–51). Moreover the certificates although bearing ten per cent interest, were sold with great difficulty, owing to the fact that it was not stated by anybody nor believed by any of the persons taking the certificates that this complainant was personally liable for them, the complainant being a corporation enjoying very high credit in the commercial community all over the United States (p. 280). They were not regarded as issued for the benefit of complainant, but of the farmers (pp. 149–50 and 71–4). The orders under which they were issued were in language which rather excluded than permitted the inference that there could be any personal liability thereon (pp. 62, 66, 77), and the Receiver himself did not think that the parties stood behind them (see pp. 74–5), nor did any holder of his paper ever indicate such an idea (Answer, p. 280).

Neither the Receiver, nor his counsel, nor any of the certificate holders notified the complainant of any claim that it was personally liable until this petition was filed. The weight of all previous authority was against such claim. Meanwhile the time to appeal from the decree had elapsed, and the time to redeem the property from the sale under the decree had also elapsed; although part of the certificates were illegal

and unauthorized, and if there had been any claim of personal liability, opposition would have been made to their allowance (pp. 280–1).

The Receiver's petition has come twice before the Circuit Court of Appeals. Each time the Court has been held by the same three judges (GILBERT, ROSS and HAWLEY). They have decided against complainant upon all points. Their decision upon the first appeal reversed that of Judge MORROW (Opinion is hereto annexed), who held that a complainant is not liable for any deficiency caused by the Receiver unless provision had been made for such liability when the suit was commenced or the Receiver appointed (see Record on former application, No. 557 of October Term, 1902, pp. 43–4). He followed the unanimous opinion of the Oregon Supreme Court in Farmers' Loan and Trust Co. vs. Oregon Pacific Railroad Co., 31 Oreg., 237, stating that the views there expressed were in accord with his own opinion. The Oregon court (whose opinion is hereto annexed), regarded its decision as in accord with the law of receivership as laid down by the leading authorities in this Court. Since the decision of the Circuit Court of Appeals, substantially the same question has been under consideration by the Supreme Court of Alabama in Wills Valley Co. vs. Galloway, 139 Ala., 276, decided in January, 1904; and that Court unanimously held that without some special equity the complainant is not personally liable. The equities here are with the petitioner.

The decisions of the Circuit Court of Appeals are thus opposed to the weight of authority, including those of two State Supreme Courts, one of them within the Ninth Circuit (which are the only other appellate tribunals before which the precise question has come), as well as to that of one of the Circuit Judges in their own jurisdiction. We respectfully submit that few

questions are more fundamental or important or interesting than the principal question raised by this record, which may be stated as follows:

Is a complainant, who has in good faith and with diligence prosecuted a suit upon a good cause of action, and upon whose application the Court has properly appointed a Receiver, and who obtains a decree fully establishing his rights, nevertheless personally responsible for a deficiency caused by the failure of the property which is the subject of the suit to bring enough to cover the allowances which had been made by the Court to the Receiver and his counsel, and the expenses which the Receiver, upon his own judgment, supported in part only by a direction of the Court, and without special request of the complainant in any instance, had incurred?

This is a question so startling that it had apparently never occurred to anybody to ask until within the last few years.

ARGUMENT.

I.

The conflict in opinion between the high appellate tribunals which have passed upon the above question makes it one eminently proper to be considered by this Court.

As we have shown, there is a conflict between three Judges of the Ninth Circuit on the one side and one of their number, reinforced by the Supreme Court of Oregon and in effect also by the Supreme Court of Alabama, on the other.

II.

The question is one of very great practical importance.

For this reason, when we made our previous and probably premature application to this court, a brief was filed in support of the application by the late Wheeler H. Peckham of the New York Bar, which brief was signed also by Messrs. Adrian H. Joline, William B. Hornblower, Herbert B. Turner, John E. Parsons, William W. Green and Allan McCulloh, representing in all seven of the principal trust companies of that city. We quote from that brief as follows (see RECORD No. 557, October Term, 1902):

> "There are several questions raised in the record in which we have no interest, and hence do not discuss them.
>
> "There is one in which all corporations and

individuals, a part of whose business it is to become mortgagees in trust for the holders of bonds issued by the mortgagor, are vitally interested, and which we desire to submit to the Court.

" That question is whether a mortgagee in trust to secure bondholders is liable for receiver's obligations and compensation where the income and proceeds of the sale of the property are inadequate to pay the same.

" The Court below has answered that bald question in the affirmative.

" It holds that a plaintiff mortgagee in trust, who has moved for and so obtained the appointment of a receiver, with the usual powers to operate, *pendente lite*, is because thereof liable to the receiver for any deficiency in the property held by the receiver, to pay the obligations and compensation of the receiver.

" It would seem that no question could be of more general importance. The highest Court of the State of Oregon has decided against the proposition. The Circuit Court of Appeals of the Ninth Circuit has decided in its favor.

" The question has never before arisen or been decided in this Court.

" It affects every one of the numberless mortgage foreclosure suits at any time pending in any Court in the United States.

" It is not a question of statutory construction. It is a question as to what is the law of the United States, or of any State, which any Court may be called upon to administer.

" In the particular concrete case it is a question as to what is the law of the United States as to obligations assumed by suitors in its Courts." * * *

" It would seem that the issue of a *certiorari* is peculiarly called for by this case. Surely the judgment below must be regarded as a novelty in jurisprudence.

" Without any express promise to assume this personal liability; without the existence of any facts from which such promise can be implied; with a judgment absolutely in plaintiff's favor; without the imposition of any condition upon which relief is granted; without any option ever having been offered to assume or decline any such liability, the Court below has imposed upon the complainant a personal liability for indebtedness and compensation of the Receiver.

" It, too, has done this when the proceeds of sale were sufficient to pay compensation to the Receiver and proved insufficient only because applied in priority to the payment of debts for which the Receiver was *not* personally liable.

" If this be law it is fair to complainants, especially when trustees, that they should be advised of it by the adjudication of the highest court; and if it be not law, that they should be relieved from apprehension of an almost limitless liability, because of the mere appointment of a Receiver over whose actions they have no control.

" An issue of the *certiorari* here applied for, and the determination thereof, would relieve the situation and provide a rule uniform in all the circuits as to what responsibility is assumed by a complainant trustee in asking the appointment of a Receiver.

" Is it not fairly one of those questions of general and pervading interest to reach which this remedy of *certiorari* is especially applicable and for which it was intended ? "

III.

The decision of the Circuit Court of Appeals in this case is inconsistent with well settled and fundamental principles of the law of receivership.

We quote again from Mr. Peckham's brief as follows :

> " All authorities agree that the property of which the receiver takes possession is the primary fund for payment of his compensation and obligations.
>
> " All authorities agree that the compensation and personal expenditures of the receiver are the first lien on the property or fund in his hands; ahead of the lien or interest of any party for whose benefit the receiver holds possession.
>
> " All authorities agree that the receiver is not the agent of plaintiff or defendant, but of the Court, and that he can be directed only by an order of the Court; and all agree that it is the duty of the receiver to so administer the property that it may become of use and benefit to whomsoever may prove to be entitled to it and may not become destroyed or burdened beyond its value while possessed by the receiver.
>
> " In no text book and in no reported case is it suggested that if the receiver finds the property so situated as to need the expenditure of money upon it, that the complainant is bound or liable to furnish that money.
>
> " In all such cases the receiver or complainant makes application to the Court for leave to borrow the money, for payment of which the receiver does not even become personally liable.
>
> " Not only that, but the lien of his certificates on the fund is junior to that of his compensation.

" It is clear in this case that there is no express contract by the complainant to pay this receiver.

" How can a contract or promise to pay be implied when the sole duty and obligation of the receiver are to take care of the property for the benefit of the complainant or others entitled, and when to encumber it even at all would be a breach of trust unless pursuant to an order of the Court?

" It is, however, suggested that there are many cases holding the parties liable to the receiver.

" We agree.

" In a certain way it may be said that all parties are liable to the receiver.

" A defendant who fails always has to pay the receiver; because the receiver's compensation is taken out of the property and the balance only applied to the payment of the debt, and the surplus is less or the deficiency greater.

" A complainant who has failed to establish his claim to the *res*, whether because of matter in abatement or in bar, may be liable to the defendant for the receiver's fees which the defendant has had to pay to the receiver in possession in order to get back his property.

" He *may* even be liable directly to the receiver if the judgment be that the plaintiff had no right in the *res* and it has been taken from the receiver by one having paramount right and from whom the receiver had no right to retain the property for compensation or fees.

" Pittsfield Bank vs. Bayne, 140 N. Y., 321, and Howe vs. Jones, 66 Iowa, 156, are illustrations.

" These and similar cases are but the reverse of the liability of defendant in that payment of the costs of receivership diminishes the amount of surplus or increases the amount of the deficiency for which the debtor is liable.

" In these cases judgment was rendered *against* the plaintiff. It was adjudged that the plaintiff

had no lien on or interest in the property which plaintiff had caused to be seized, and that as the seizure was wrongful and the receiver could not deduct his fees before turning over the property, the plaintiff might be liable to pay them *because the plaintiff had failed in his suit.*

"But where, as in this case, the plaintiff has succeeded, where the judgment is completely in his favor, we submit that there is no principle on which the plaintiff can without his consent be made liable to the receiver."

Neither party can give any orders to the Receiver or in any way control his actions. He does not, in any proper sense of the word, "serve" them or either of them. He is the bailiff of the Court, and, during the pendency of the suit, the Court is in adverse possession.

In the first case in this Court on the subject, in 1854, Mr. Justice WAYNE said that the Receiver "is an indifferent person between the parties," "an officer of the court;" that it "is the court itself which has the care of the property in dispute. The Receiver is but the creature of the court" (*Booth vs. Clark*, 17 How., 322, 331). "He is not appointed for the benefit of either of the parties, but of all concerned" (*Davis vs. Gray*, 16 Wall., 203, 218). In the familiar case of a railroad receivership, as has been so often held in connection with Receivers' certificates and with questions of priorities, "all concerned" include the public as well as the parties; and an irrigation company like the mortgagor in the present case is also a *quasi* public corporation (*Fall Brook Irrigation District vs. Bradley*, 164 U. S., 112), so that the Court cannot be considered as having been operating this property for the benefit alone of the complainant, defendant and intervenors. *Non constat* but that had these parties all desired the presevation of the work to be abandoned, the Court might have considered it in the public interest to disregard their wishes. This Court has always

maintained the position that a Receiver is an agent of the Court and derives no authority from the act of the parties at whose suggestion or by whose consent he is appointed (*Chicago Union Bank vs. Kansas City Bank*, 136 U. S., 223, 236; *Quincy, Missouri & Pacific R. R. Co. vs. Humphreys*, 145 U. S., 82, 97).

The lower Federal Courts have always maintained the same doctrines. See, for instance, *Texas & St. Louis Ry. Co. vs. Rust*, 17 Fed. Rep., 275, 282; *Central Trust Co. vs. Wabash, St. Louis & Pacific Railway Co.*, 23 Fed. Rep., 863; *New York, P. & O. Ry. Co. vs. New York, L. E. & W. Ry. Co.*, 58 Fed. Rep., 268, 278. Thus in the Wabash case, where the Receivers had been originally appointed upon the petition of the railway company, and the mortgagees afterwards applied for their reappointment as Receivers in the foreclosure suits, Mr. Justice BREWER, then Circuit Judge, said (23 Fed. Rep., at p. 868), in overruling the application: "As we look upon it, the receivers are not receivers for either party. They are simply the hand of the court. In the process of the litigation the court has taken possesion of the property, and holds it neither for the mortgagor nor the mortgagee, and it matters not, for the ultimate determination of the suit, at whose instance the receivers were appointed. They act for neither party. They represent neither party. They stand here simply as the hand of the court, holding the property for disposition at the end of the litigation, for the benefit of all. So I cannot see what can be gained as a legal proposition by a new order of appointment extending the receivership, as counsel say, to the trust company, the mortgagee."

The Receiver, thus being the agent of the Court and not the agent of either party, there is no legal principle upon which his contract may be treated as the contract of either party. This obvious fact has been often noticed in various ways. Thus, in *Turner vs. Peoria & Springfield R. R. Co.*, 95 Ill., 134, 145-6, decided in 1880, where the question raised was whether Receivers'

certificates were negotiable, the Court held them non-negotiable upon the following reasoning : " Whether, in any event, they are payable in full depends upon the question whether the fund under the control of the court is sufficient for that purpose. That fact cannot be known except upon inquiry into the amount of such certificates issued by the officer authorized to act, and as to the value of the fund to be administered." This case is referred to in all the text-books as authoritative. It was followed in 1883, in *McCurdy vs. Bowes*, 88 Ind., 583, 584–5, where the Court said that such a certificate " is the mere acknowledgment that a debt is due the payee, payable out of a specific fund."

Mr. Beach says, as to Receivers' certificates, that " there is no one personally liable for their payment " (Beach on Receivers, § 416). Mr. Smith says that such a certificate " is payable solely from the funds of the receivership, and that there is no responsible party back of them to be made liable in case of default " (Smith on Receivers, § 287). Mr. High's statement is to the same effect (High on Receivers, § 398*e*).

In England, where Receivers' certificates do not seem to be used, the Receivers are personably liable unless special arrangements are made to the contrary. They are indemnified out of the fund, but the idea that the parties applying for Receivers are personally liable upon any theory seems never to have suggested itself (Kerr on Receivers [London edn., 1900], p. 208 ; *Burt vs. Bull*, 1895, 1 Q. B., 276, 279, 280, 282, 284).

Judge CALDWELL, of the Eighth Judicial Circuit, who had had wide experience in these matters, delivered an address on " Railroad Receiverships in the Federal Courts," which was reprinted in the " American Law Review " in 1896, and has had wide circulation and citation, especially in the Western States. Speaking of the Receiver, he says positively that " neither party is responsible for his contracts " (30 American Law Review, 162).

It is respectfully submitted that upon this view of the law, held by everybody and questioned by nobody,

immense numbers of business transactions, great and small, have been based. Receivers have had to pay high prices because they could give no security except that of the fund in court. For the same reason their certificates have carried very high interest, or been sold at great discount, or both. The complainants in the more important cases have been usually trust companies possessed of large means and high credit. Judge GILBERT says in his opinion at page 338 : "It (the trust company) was bound to know the law and to know the nature of the obligation which it assumed in asking the Court to appoint the Receiver to manage the property." But the law was generally regarded as imposing no personal liability whatever in such cases—until the remarkable decision in this case.

Had it not been regarded as established law that there was no personal responsibility on any party's part for the expenses of a receivership, many great properties would have been at once sacrificed, which, by means of Receivers' certificates, sold at a discount have been carried through hard times and put on a sound basis again under direction of the Courts.

The learned Circuit Court of Appeals evidently considers that this is a case where one of two innocent parties must suffer because somebody did not have foresight enough to see that the property was not of sufficient value to warrant an expensive receivership, and comes to the conclusion that the suffering must be cast upon the absent trust company rather than upon the Receiver, notwithstanding that the latter was on the ground and charged with the duty of knowing all about the property, a duty for the performance of which he and his counsel divided up between them six-sevenths of its total value. It is submitted that there are two complete answers to this suggestion : First, that there is no principle in the law of agency or elsewhere upon which such a liability can be imputed to a complainant, whether the complainant or the Receiver may have been the party more responsible morally for the loss ; and second, that the Receiver and his coun-

sel, so far as their own compensation is concerned, and the recipients of certificates and time checks, so far as their compensation is concerned, are persons who must be presumed to have understood the risk which they were taking and to have secured payment for that risk. If the Receiver and his counsel were willing to keep on working, and the other persons concerned to keep on assisting in the Receiver's work or supplying him with materials, although there was no warrant for supposing that anybody would be personally liable for their compensation, while the text books on the subject were unanimous in stating the contrary, there is no more justice than there is law or equity in now mulcting the complainant in order to pay their losses.

Examination of the authorities cited by the learned Circuit Court of Appeals in its first opinion (119 Fed. Rep., 257) show that none of them are in point. So far as they approach the subject at all, they may be divided into three classes (we add some also which were not cited by it): first, those which hold that when the *order appointing the receiver is illegal* and was improperly obtained by the plaintiff, it would be inequitable to charge the expense upon the property, and, therefore, it must be charged to the plaintiff, a familiar rule of obvious correctness (*Pittsfield Nat. Bank vs. Bayne*, 140 N. Y., 321, 330–1, per PECKHAM, J.; *French vs. Gifford*, 31 Iowa, 428; *McAnrow vs. Martin*, 183 Ill., 467; *Link Belt Co. vs. Hughes*, 195 Ill., 413); second, those which hold that when the receivership order was legal, but the plaintiff is finally defeated in the suit, the chancellor has power to charge the receivership expenses upon him as *part of the costs* (*Highley vs. Deane*, 168 Ill., 266; *City of St. Louis vs. St. Louis Gas Light Co.*, 87 Mo., 223; *Cutter vs. Pollock*, 7 N. Dak., 631), although this power can be exercised only when the plaintiff's action in commencing suit and obtaining a Receiver involved an impropriety (*Ferguson vs. Dent*, 46 Fed. Rep., 88, 96–8; *Elk Fork Oil Co. vs. Foster*, 99 Fed. Rep., 495); and third, when there was no fund at all for the Receiver to take, so that his acts in tak-

ing possession of the property were in derogation of the rights of the lawful owner, whose rights could and should have been respected by the plaintiff. This last exception has had two different applications: first, to the case of a receivership in a suit against A, the property turning out to belong to B, who had no interest in the controversy (*Howe vs. Jones*, 66 Iowa, 156); and second, when the receivership is of an equity of redemption, the property is not sufficient to take care of the prior mortgage, and the plaintiff has failed to obtain the consent of the mortgagee to the receivership (*Tome vs. King*, 64 Md., 166; *Ephraim vs. Pacific Bank*, 129 Calif., 589), and even then, if the equities favor the complainant, it will alter the rule (*Ephraim Case* (2d appeal), 136 Cal., 646; *Wills Valley Co. vs. Galloway*, 139 Ala., 276).

IV.

The point is not foreclosed by the denial of our former application for a writ of certiorari.

And this for two reasons:

In the first place, the situation now presented is very different from that presented upon the former application, as has been pointed out by us in our statement of facts. Then it was claimed to stand admitted by our demurrer that our client had induced the expenses sought to be charged personally upon it by requesting that they be incurred, and assuring the Receiver that the property would bear them; and the suit was claimed to be a collusive one. Now the Receiver has admitted the contrary to be true, and admitted facts showing that no easily imaginable case could be stronger in favor of the complainant than

this one—that if this complainant is responsible, then all complainants must necessarily be held responsible for receivership deficiencies (see Statement of Facts, *supra*).

In the second place, the former application was made at a preliminary stage of the action, and to review a decree which in effect sent the cause back for further proceedings—a situation in which this Court customarily refuses the writ, although, as there had been exceptional cases, we had hoped to secure it.

V.

There is also a further question of some importance in the case, and one which was not before the Court on the former application, the record then containing defects which prevented its presentation. This question is the following:

After a decree of foreclosure, and without reopening that decree, has the Court any jurisdiction to charge the expenses of the suit personally against any party thereto, unless jurisdiction to do so had been in some way reserved?

Complainant's then counsel, at the time of the original hearing on demurrer before Judge MORROW, failed to incorporate the decree of foreclosure in full into the record. Hence upon the appeal it could make only the point that *the decree confirming the sale* contained no sufficient reservation of jurisdiction. This point was overruled, by what we believe to be erroneous construction of the decree, but by a ruling which we would not for a moment suggest to be of sufficient general interest to form the basis of the issuance of a writ of *certiorari*. We submit, however, that the *decree*

of foreclosure is the final decree in a foreclosure suit, except so far as it expressly reserves jurisdiction or so far as jurisdiction is necessarily implied (as for the purpose of confirming the sale and distributing the proceeds). It is of course within the power of the Court to reserve any or all questions not absolutely necessary to be adjudicated before the sale. A familiar form is to be found at 118 Fed. Rep., 34; but the Court there in effect ruled that jurisdiction not expressly reserved did not survive, and hence that it had no jurisdiction to certify to this Court any jurisdictional question after the expiration of the term at which the decree was rendered.

The subject of costs is one which is customarily disposed of by the decree of foreclosure. It was so disposed of in the decree of foreclosure in the present case (pp. 174–8). The compensation of the commissioner for making the sale was fixed (p. 190) and provision was made as to what costs should be a personal charge upon parties to the suit (pp. 211–12). When the subject of costs is thus taken up and disposed of, and no right to modification reserved, its reopening cannot be regarded as a proper incident thereafter to a mere enforcing order. It is submitted that every party to a final decree of foreclosure and sale has an absolute right to absent himself altogether from all future proceedings, with a sense of security as against any claims not already adjudicated, excepting only if he be served with notice of an application to open or review that decree.

Therefore your petitioner avers that the present case is one in which it is proper for this Court to issue a writ of *certiorari* for the following reasons, among others:

1. Because there is an important conflict between the decision of the Circuit Court of Appeals for the Ninth circuit and the Supreme Court of Oregon in the same circuit.

2. Because the questions of law involved herein have not been passed upon by this Court.

3. Because in the interest of uniformity of decision, this Court should pass upon the questions of law involved herein.

4. Because in view of the large number of mortgages issued by quasi public corporations to trustees, said questions are of sufficient general importance and interest as to make it necessary that they should be determined by the Court of last resort.

Your petitioner, therefore, upon the printed transcript of record and of the opinion of the Circuit Court of Appeals herewith submitted, respectfully prays the issuance of the writ of *certiorari* as aforesaid.

Dated New York, September 6th, 1906.

EDWARD B. WHITNEY,
STANLEY W. DEXTER,
Of Counsel for the Atlantic Trust Company, Petitioner.

APPENDIX I.

IN THE CIRCUIT COURT OF THE UNITED STATES,

NINTH CIRCUIT, NORTHERN DISTRICT OF CALIFORNIA.

THE ATLANTIC TRUST COMPANY (a Corporation), Plaintiff, vs. THE WOODBRIDGE CANAL AND IRRIGATION COMPANY (a Corporation), Defendant.	No. 11950.

(MONDAY, MARCH 11, 1901.)

OPINION, MORROW, J.

(On order to show cause why judgment of deficiency should not be entered against the plaintiff.)

SCRIVNER & HOPKINS, attorneys for plaintiff.
FOX & GRAY, attorneys for Receiver.

MORROW, *Circuit Judge:*

On the 3rd of October, 1894, a bill in equity was filed in this Court by the plaintiff to foreclose a mortgage upon the property of the defendant, and for the appointment of a receiver, pending the termination of the foreclosure proceedings, to take charge of all the

corporation property, consisting principally of a system of irrigating canals, water rights and franchises, and certain lands and personal property connected therewith. The defendant appeared by counsel, and on the same day consented to the appointment of a Receiver, who was accordingly appointed, and entered into possession of the said property. On September 18, 1897, a decree was entered in favor of the plaintiff, and in accordance therewith the property was sold on August 15, 1898, for $21,000, a decree confirming the sale being entered upon that date.

It appears that under the decree of the Court this amount has been distributed, as compensation for the receiver, fees for the attorney for the receiver, and certain other fees including a *pro rata* payment of accrued interest, on Receiver's certificates amounting in all to $21,000. It appears further that there is still due on Receiver's certificates $42,848.96.

Upon the petition of the Receiver an order to show cause was granted for the purpose of ascertaining why the amount due to the Receiver and his employees, as shown by his final report in this case, should not be settled and allowed; why a judgment for the total amount of the deficiency should not be entered against the plaintiff, The Atlantic Trust Company; and why the Court should not issue such supplemental decree, or order, as would require the plaintiff to pay such deficiency.

I am of the opinion that provision should have been made when this suit was commenced, or at the time when the Receiver was appointed, for the payment of or security for the amount of his expenses, and for the redemption of whatever certificates might be issued by him, in the event that the proceeds of the sale of the property should prove insufficient. But such provision was not made at the time by the Court, and I am of the opinion that the Court is without authority to do so now. In Farmers' Loan Co. vs. Oregon Pacific R. R. Co., 31 Or. 237, this question was fully

considered, and the views there expressed are in accord with my opinion in the present case.

The order to show cause will, therefore, be discharged.

SOUTHARD HOFFMAN,
Clerk.

[ENDORSED:] Filed March 11th, 1901.

APPENDIX II.

OREGON SUPREME COURT.

FARMERS' LOAN AND TRUST COMPANY,
Respondent,

AGAINST

OREGON PACIFIC RAILROAD COMPANY ET AL.,
Petitioners-Appellants.

[31 Oregon 237]
38 L. R. A. 424

MAY 1, 1897.

Appeal by petitioner from an order of the Circuit Court for Benton County refusing to compel plaintiff to pay their claim for services rendered to a Receiver appointed in a proceeding to foreclose a mortgage which had been instituted by plaintiff. Affirmed.

Statement by BEAN, J.:

This is an appeal from an order of the Circuit Court of Benton County denying the petition of certain employees of the Receivers of the Oregon Pacific Rail-

road Company for an order requiring the plaintiff in the foreclosure suit, in which such Receivers were appointed, to pay the wages of the petitioners. On October 28, 1890, the Farmers' Loan and Trust Company, as trustee for the bondholders of the Oregon Pacific Railroad Company and the Willametta Valley and Coast Railroad Company, commenced a suit in the Circuit Court of Benton County to foreclose a mortgage on the franchise and property of the defendant corporations to secure the payment of the bonded indebtedness thereof, amounting, as alleged, to $15,000,000, and, on its motion, T. Egerton Hogg, the president of the corporation, was appointed Receiver and clothed by the Court with authority to operate the railroad and receive the income and earnings thereof, and to that end he was empowered, from time to time, to employ and discharge all needful assistants, managers, clerks, servants, agents and employees at such salaries and compensation as he might deem advisable. Under this appointment Hogg operated the road as a Receiver until March 6, 1893, when he was removed and one Hadley appointed in his place, who continued in the operation thereof until January 6, 1894, when he was also removed and another Receiver appointed. Under the management of Hogg and Hadley the earnings of the road were wholly insufficient to pay the expenses of the receivership, and, as a consequence, the wages of the employees were allowed to fall greatly in arrears, so that, at the time of Hadley's removal, there was due the petitioners herein a very large sum for wages and no funds whatever in the hands of the Receiver with which to pay it; and we take it (although not directly averred in the petition) that the Receiver had exhausted his power to float receivers' certificates.

Prior to this time several unsuccessful attempts had been made to dispose of the road under the decree in the foreclosure suit rendered on the 27th of April, 1891. In this condition of affairs some of the employees, despairing, and with reason, as the sequel showed, of ever being able to obtain payment of their

wages from the earnings or the *corpus* of the mortgaged property, filed a petition on January 26, 1894, setting out substantially the facts hereinbefore detailed, and praying an order of the Court requiring the plaintiff in the foreclosure suit to deposit in Court sufficient money for the payment of their wages. The petition was denied, and hence this appeal.

BEAN, J., delivered the opinion of the Court.

This is, so far as we can ascertain, the first recorded instance in the judicial history of railroad receiverships in which the trust fund was insufficient to pay the employees of the Receiver engaged in the operation of the road; and, hence, we are unaided in the determination of the question before us by any judicial decision directly in point. The contention of the petitioners seems to be that a Receiver of a railroad appointed in a suit to foreclose a mortgage on the road, clothed with authority to operate it, is as much the representative of the plaintiff as a Sheriff who levies upon property under a writ of attachment, and that the operating expenses incurred by him are costs or fees of the litigation, and, like the fees of the Sheriff in the case referred to, are collectable from the plaintiff. But this argument is based upon an entire misapprehension of a railroad Receivers' position and duties. He is not like a Sheriff in an attachment action, the agent of the plaintiff to the litigation, nor does the plaintiff have any control or authority over him whatever. He is agent and executive officer of the Court, which, by virtue of its high prerogative powers, lays its judicial hand upon the property which is the subject of controversy and controls and operates it for the use and benefit, not of either of the parties to the litigation, but for the public and whomsoever in the end it may concern. His acts and possession are the acts and possession of the Court. His contracts and liabilities in contemplation of law are the contracts and liabilities of the Court. The parties to the litigation have not the least authority over him, nor have they any right to determine what liabilities he may or may

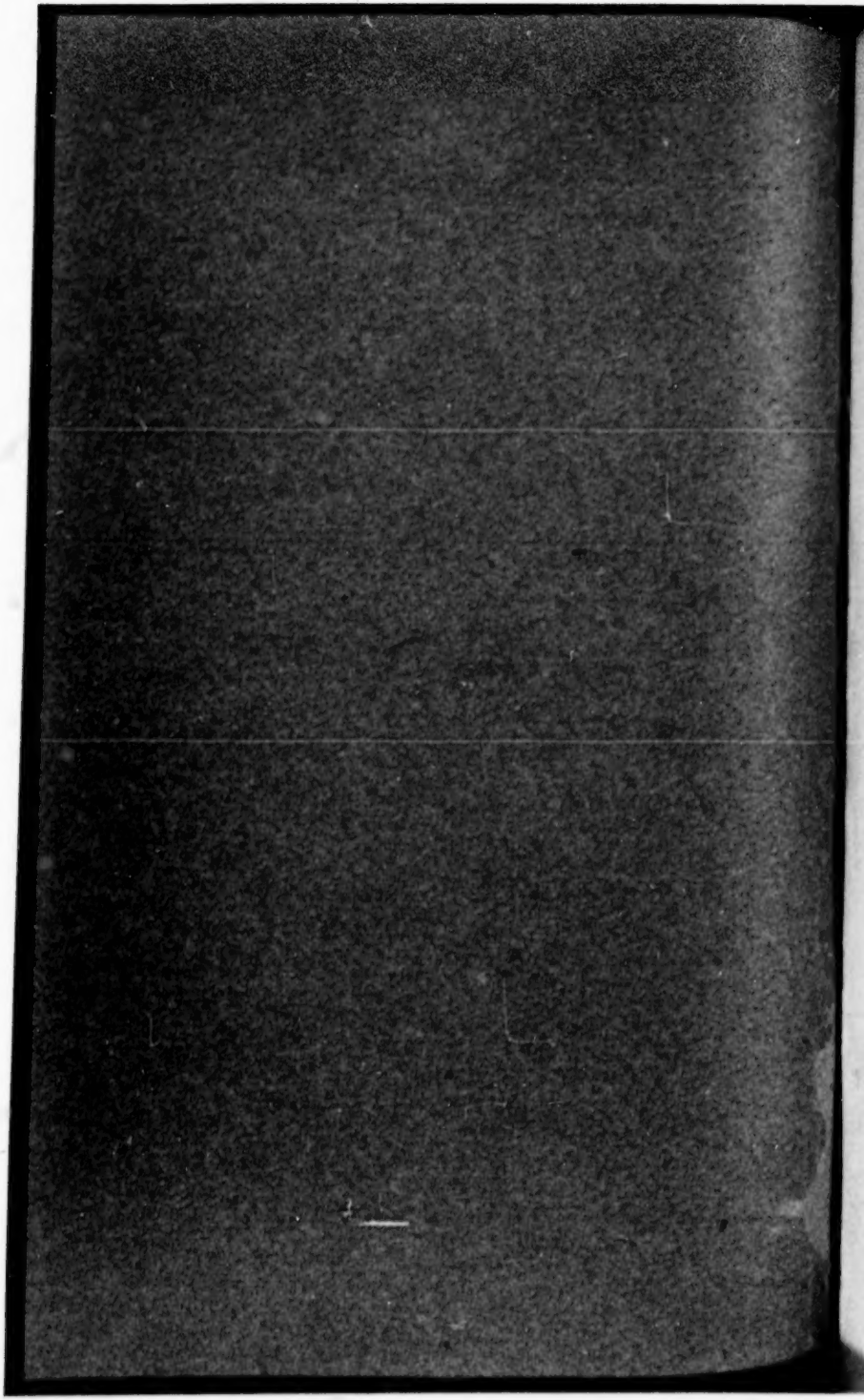
not incur. His authority is derived solely from the act of the Court appointing him, and he is the subject of its order only. "A receiver of a railroad," says Mr. Justice CALDWELL, "is a person appointed to receive and preserve the property of a railroad company, and is clothed with authority to operate the railroad, and receives the earnings and income therefrom during the pendency of the foreclosure suit. In contemplation of law, the railroad is in the custody of, and operated by the court appointing the receiver. The receiver is the agent of the court. He is an officer of the court, and his possession of the property is the possession of the court. He is not the agent of either party to the suit, and neither party is responsible for his contracts or for his malfeasance or misfeasance in office. * * * The liabilities incurred by the receiver in the operation of the road are, strictly speaking, the liabilities of the court appointing the receiver" (30 Am. L., Rev., 161). And in Quincy, M. & P. R. Co. vs. Humphreys, 145 U. S., 82, 36 L. Ed., 632, the Court, speaking of the Wabash Receivers, said: "They were ministerial officers appointed by the Court of Chancery to take possession of and preserve *pendente lite* the fund or property in litigation; mere custodians coming within the rules stated in Union Nat. Bank v. Bank of Kansas City, 136 U. S., 223, 236, 34 L. ed., 344, 346, where this court said: 'A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property.'" So, also, in the case of New York, P. & O. R. Co. vs. New York, L. E. & W. R. Co., 58 Fed. Rep., 268, it is said: "Receivers are but officers and agents of the court. While necessarily much is committed to their judgment and discretion, yet their power depends upon the decrees and direc-

tions of the Courts appointing them. Receiverships of railroad properties are in a large part peculiar appointments. Railroads as public carriers, are charged with great public duties, and the public are interested that their operations shall be continuous. Creditors are likewise interested that there shall be no cessation in their maintenance as going concerns, because their value as property depends upon the active use of the line. These considerations have developed the present well settled proposition that such Receivers are the mere custodians of the property, and hold for and as mere agents of the Court. Speaking of the character of such trustees, and the effect of such holding upon the interests procuring the appointment, Chief Justice WAITE said: "The possession taken by the Receiver is only that of the Court, whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the Court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place" (Fosdick vs. Schall, 99 U. S., 251, L. ed. 343; Quincy, M. & P. R. Co. vs. Humphreys, 145 U. S., 82, 36 L. ed. 632). "A Receiver represents no particular interest or class of interests. He holds for the benefit of all who may ultimately show an interest in the property. He stands no more for the creditor than the owner. They are not assignees, and the principles of common law applicable to assignees do not define or determine the character of a Receiver's possession, or its effects upon the rights of those interested in the property in their possession. Receivers ought not to be appointed to represent the peculiar interests of one class." To the same effect see Texas & St. L. R. R. Co. vs. Rust, 17 Fed. Rep., 275; Central Trust Co. vs. Wabash, St. L. & P. R. R. Co., 23 Fed. Rep., 863; Ames vs. Union Pac. R. R. Co. 60 Fed. Rep., 966; and Union Trust Co. vs. Illinois Midland R. R. Co., 117 U. S., 455, 29 L. ed., 970.

A railroad Receiver is, therefore, more than a mere custodian of the property, like a Sheriff holding under a writ of attachment or execution. He is, in effect, the hand of the Court, which holds the property while it operates the road pending the litigation for the benefit of the general public, as well as the creditors of the insolvent corporation. It is for this reason that the expenses of the receivership are chargeable as a lien upon the property superior to all other liens. The plaintiff, at whose instance the Receiver is appointed, thereby consents to the absolute control and management of the mortgaged property by the Court and its agents and to the priority of claims for the expenses incurred in its operation and management; but it is not perceived upon what ground it can be claimed that, because the expenses of the receivership are allowed without any fault of his to exceed the value of the mortgaged property, thus entirely destroying his security, he must, in addition to the loss of his debt, be compelled to make good the deficit, unless the order of appointment was made upon that condition. He has no control over the acts of the Receiver, and if without his consent he is to be held responsible therefor, he is liable to absolute bankruptcy and ruin. Such a rule would render the plaintiff's position so uncertain and precarious as practically to preclude him from any protection whatever through the appointment of a Receiver pending the foreclosure suit. But the inquiry is made, shall not a railroad mortgagee who applies for and obtains the appointment of a Receiver, with authority to operate the road, be held responsible for the liabilities incurred by such officer when they cannot be made out of the property itself? We think not, unless such responsibility was imposed as a condition to the appointment or the continuance of the Receiver in office. The appointment of a Receiver in a suit to foreclose a railroad mortgage is not a matter of strict right, but rests in the sound judicial discretion of the Court; and it may, as a condition to issuing the necessary order, impose such terms as may

under the circumstances of the particular case, appear to be reasonable, and, if not acceded to, may refuse to make the order (30 Am. L. Rev., 161; Fosdick vs. Schall, 99 U. S., 235, 25 L., Ed., 399). If, therefore, upon an application for the appointment of a railroad Receiver, it appears probable that the income and corpus will prove insufficient to pay the expenses and liabilities thereof, we have no doubt that the Court may require of the plaintiff, as a condition to such appointment, a guaranty of the payment of the expenses of such officer. And if, at any time after the appointment has been made, it becomes apparent to the Court that it will be unable to pay and discharge the present or future liabilities incurred by its executive officer and manager, it should refuse to continue the operation of the road under the Receiver, unless its expenses are guaranteed. No Court is bound or ought to engage or continue in the operation of a railroad or any other enterprise without the ability to promptly discharge its obligations, and, unless it can do so, it should keep out, or immediately go out of the business. But, unless such terms are imposed as a condition of the appointment or continuation in office of the Receiver, his employees must look to the property in the custody of the Court and its income for their compensation. They have no claim whatever on any of the parties to the litigation. They are the employees and servants of the Court, and not of the parties. Their wages are in no sense costs of the litigation; and, although incurred during the progress of the suit, they are not incurred in the suit. They are neither expenses of the plaintiff, nor of the defendant, and are not fees or costs which can be charged against the successful party to the litigation, as is sought to done in this case.

It follows that the order appealed from must be affirmed, and it is so ordered.



Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 109.

ATLANTIC TRUST COMPANY,
Petitioner,

vs.

EDGAR C. CHAPMAN, Receiver of the Woodbridge Canal and Irrigation Company *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONER'S BRIEF.

The writ of *certiorari* issued herein brings up for review a "Judgment and Decree" of the Circuit Court of the United States for the Northern District of California in proceedings supplementary to decree of foreclosure and decree of confirmation of sale under said foreclosure, had on final report and petition of E. C. Chapman, Esq., Receiver in said cause, praying for settlement of his final account, &c. The amended decree appealed from is found at pages 151-154 of the Record, and, by its terms, judgment was directed in favor of the said Receiver and against the complainant The Atlantic Trust Company for

deficiencies on account of Receiver's Certificates and advances made by and expenses incurred by the Receiver, after application of the net proceeds of sale of the property, aggregating, with interest to the date of the decree, March 30, 1904, the sum of $36,207.57, with interest thereon at 7 per cent. per annum and costs (Record, p. 154). This judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit (Opinion, at pp. 169-172; Decree of Affirmance, at p. 172 of Record). The appellant thereupon presented its petition to this Court for a writ of *certiorari*, which was duly granted (p. 173) on October 16, 1906, and in conformity thereto the record and proceedings in this cause have been certified and removed into this Court for its determination and review.

Statement of the Case.

I. History of Litigation.

The original title of the cause was "The Atlantic Trust "Company (a corporation) as Trustee of the trusts created by "the mortgage in this complaint described, Plaintiff,

vs.

"The Woodbridge Canal and Irrigation Company (a corpora- "tion), Defendant."

Record, p. 1.

The action was in foreclosure and was instituted in the United States Circuit Court for the Northern District of California.

The bill of complainant, filed October 3, 1894, set forth the trust mortgage in full, the issue of bonds thereunder, a default in payment of interest on September 1, 1894, waiver by defendant of certain conditions precedent to enforcement of default, and the request on the part of a majority of bondholders for the commencement of the action, and prayed for the appointment of a Receiver to take charge of the mortgaged property, and to maintain and operate the canals under the direction of the Court, for a determination of the number of bonds legally issued and outstanding, and for foreclosure and sale of the corporate property (Record, pp. 1-18). Chapman, the re-

spondent herein, was appointed such Receiver the same day, and qualified by filing a bond of $10,000 (pp. 20–22). Various intervenors from time to time were subsequently admitted as defendant's (p. 62, and see entries in clerk's docket, pp. 82–86). The bill was once amended, with reference to the number of bonds claimed to have been legally issued and outstanding (pp. 40–61). An order taking the amended bill *pro confesso* was entered on March 5, 1896 (p. 61). Owing to continued delays caused by the interventions (Answer, pp. 135–137) the decree of foreclosure and sale was not entered until September 18, 1897 (pp. 86–107). This decree was in all respects favorable to complainant, except that it admitted certain intervenors to participate in the benefits of the sale. Provision was made for the payments of costs and the Receiver's expenses and certificates out of the proceeds of sale. Owing to the delays and unforeseen disasters hereinafter more fully set forth (see also answer, p. 138), the defendant's property had so depreciated in value that great difficulty was had in making a sale, and it was finally struck down to one Thompson, acting on behalf of the Receiver and his attorneys, for $21,000, an amount just sufficient to cover the fees of the Receiver and his counsel, the commissioner's and clerk's fees and expenses for making the sale—and to make a small *pro rata* payment of $490.70 on the accrued interest on Receiver's certificates (p. 113), leaving unpaid all other expenses and certificates of the Receiver. The sale was confirmed by an order or decree entered August 15, 1898 (pp. 108–113), and the commissioner directed to deliver deed—in case redemption be not made of the property within six months (p. 112).

The period for redemption expired February 10, 1899, the Receiver remaining in possession until then (p. 115) and his final report and petition was filed August 3, 1899 (pp. 114–121) but was not acted upon nor brought to the complainants' attention until November 18, 1899, when an order was granted by Judge Morrow, ordering the complainant to show cause why the amount due the Receiver and his employees should not be settled and allowed and why judgment for the total amount of the deficiency shown by the clerk's report should not be entered against complainant.

When this order was served, the time for appeal from the decree of confirmation had already expired, as well as the

time for redemption, and no opposition could then be made to any of the items of expenses nor to the validity of any of the Receiver's certificates (Answer Twelfth Parag., p. 142).

Complainant at first demurred to the Receiver's petition and the demurrer was sustained by Judge MORROW (p. 126). On appeal to the Circuit Court of Appeals, the order of Judge MORROW was reversed (p. 127). The opinion of the Court on that reversal will be found reported, *sub nom.*

Chapman vs. Atlantic Trust Co., 119 Federal Reporter, 257.

The complainant then answered the petition upon the merits, denying some of its allegations and setting up a number of affirmative defenses.

The answer incorporated by reference considerable portions of the record of the case. These portions of the record were examined by the Court and are brought up here in the present record.

This answer is to be found at pages 129–144 of the record.

The petition is to be found at pages 114–121. The admissions and denials of the answer are set forth at pages 130–134; the affirmative matter being found at pages 134–143.

The cause was submitted to the Court below "as upon bill and answer" (p. 146):

> "By consent it is ordered that the receiver's *ex parte* motion to submit this cause on the issues joined by the final report and petition of receiver, and complainant's answer thereto, be and is granted; the receiver's solicitor waiving replication to complainant's answer, and complainant's solicitor consenting that this submission be as upon bill and answer."

The effect of this submission was that the petitioner admitted the truth of every allegation of the answer, and abandoned every controverted allegation of the bill.

Certain mutual and reciprocal admissions and waivers made by the parties upon the hearing are set forth at page 152.

Many allegations contained in the petition (which stood admitted by demurrer when the case was previously before the Court below) are now eliminated by reason of the denials in

the answer, viz., the allegations that the expenses were incurred on the motion or request of the plaintiff; that the Receiver acted upon the assurances of the complainant as to the sufficiency of the property to pay the foreclosure expenses; that the foreclosure suit was irregular or collusive; that the acts of the complainant contributed to the delay of the suit and its disastrous result.

The main facts which are now before the Court, as admitted, are that the suit was legally and properly commenced; that the Receiver was completely informed at the time of his appointment as to the circumstances of the case (pp. 132–134, 20, 6, 7) that the disastrous result of the foreclosure suit was one which could not have been anticipated by the use of ordinary foresight; that it was largely due to inherent defects in the location of the principal dam by the defendant, which defects were unknown to all parties and to the Receiver; that the Receiver himself was the person best acquainted with the situation at all times and was the one who, if anybody, should have given warning that future expenses might result in a deficit upon the sale; that so far as the final disaster was due to human mistakes it was due to the mistakes of the Receiver and his employees; that the delays which prolonged the litigation, and incidentally prolonged the receivership until the breakdown of the dam, were due mainly to matters beyond complainant's control, namely, to interventions by outside parties and delays caused by the litigation necessarily resulting, and by the pressure of other business upon the Court, so that immediate decision upon these difficult questions could not be obtained.

Judge MORROW constrained by the decision of the Circuit Court of Appeals, directed a judgment for the Receiver (pp. 151–154).

On appeal to the Circuit Court of Appeals, that Court, held by the same Judges (GILBERT, ROSS and HAWLEY) as on the first appeal, again decided against complainant on all points, reiterating its previous decision reported in 119 Federal, 257. The Court summarily disposed of all the defenses adverse to the complainant and affirmed the judgment (OPINION, pp. 169–172).

145 Federal Reporter, 820.

The items making up judgment appealed from are as follows (p. 153):

Balance on Receiver's certificates	$18,367.19
Receiver's advances	4,524.90
Time checks	8,348.85
Open accounts	3,309.15
Supplemental accounts	1,657.48
	36,207.57
Costs of special proceeding	173.55
Total	36,481.12

(N. B. There is a typographical error at top of page 154, which makes item $1,228 instead of $128.)

II. The Receiver's Certificates.

The order appointing the Receiver required him as soon as possible to make and file an inventory. It also required him to continue the operation of the works of the defendant company, keeping full accounts. On the day after his appointment he visited the works at Woodbridge, in the County of San Joaquin, for that purpose. He immediately took charge through a bookkeeper, and thereafter remained in charge through his superintendent and other agents and workmen. He became at once fully aware of the peculiar circumstances of the case, of the expensive and difficult nature of the operations, and of the shortness of cash. He learned that the property consisted of a system of canals, ditches and laterals, beginning at a dam in the Mokelumne River at the Town of Woodbridge. The defendant company had been operating this system, and supplying irrigation to farmers in the vicinity. His first report, drawn by his counsel and dated December 29, 1894, or less than three months after his appointment, shows that he was not acting in any way as agent for the complainant in the suit, but entirely upon his own responsibility, subject only—and even this he later little sought, as will appear—to the advice and control of the Circuit Court. Among other things, he caused such repairs as he considered necessary to be made upon the Woodbridge dam (pp. 22–30).

In this report the Receiver represented to the Court that

he was without funds, and prayed the Court for an order authorizing him to borrow the sum of $7,500 to be used for necessary expenses.

By the time that this report was filed, the first intervention had already taken place (p. 135). The bill for this purpose was filed by R. B. Salisbury and others on December 10, 1894, and caused litigation which continued pending until 1897. They appeared in court on January 21, 1895, at the hearing upon the Receiver's first report, although this complainant did not then appear (p. 30). The result of this hearing was an order authorizing the issuance of Receiver's certificates bearing interest at eight per cent. The order is not important, since the Receiver failed to find investors. This fact he submitted to the Court in his second report, which is to be found at pages 32, 33, of the record. It was filed January 31, 1895. He states fully the financial status at that time, together with the difficulties with which he was confronted. He reports that without borrowing money he would "be entirely unable to manage and care for the said property, to protect it from damage and loss, or to preserve defendant's title to water rights." He does not suggest in the most remote way that if the measures which he recommends should be adopted, there would be any risk whatever of a failure to realize at least the expenses of the receivership, The relief which he asked was permission to borrow not less than $5,000 (p 33),

> "and to issue therefor receiver's certificates, which shall be and constitute a first lien upon and preferred claim against the mortgaged property described in the complaint in this cause, *to be paid out of the proceeds of any sale made in this cause, or out of any other funds that shall come into the hands of this receiver applicable thereto.*"

It will be noticed that there is no suggestion here that the receiver's certificates should be a personal claim against the complainant or anybody else.

His report came before the Court on February 6, 1895. Both parties appeared, as also did the intervenors (p. 34). The complainant consented in open Court to the request of

the Receiver, who was accordingly authorized to borrow $5,000 (p. 34),

> " and to issue his certificate or certificates therefor, payable out of any funds that may come into his hands as such receiver applicable thereto, with interest thereon at such rate as he shall find necessary in order to secure such loan, *but not to excced ten per cent. per annum*, and that the certificates so issued shall be and constitute a first and prior lien upon all the property described in the mortgage for the foreclosure of which this action is brought, and if not paid prior thereto, then to be paid out of the proceeds of any sale of said property next after the costs of suit and sale, and before the payment of any other sum on account of said mortgage, or the indebtedness secured thereby."

Here again it will be perceived that there is no provision making the certificates a personal claim against anybody.

Under this order receiver's certificates were issued to an amount of $2,350, according to the receiver's fourth report (p. 75, Filed Aug. 10, 1897):

> " Even under this order I found myself unable to raise money on certificates issued by me thereunder, except in small sums raised from time to time, aggregating the sum of $2,350.00, and these were the only certificates ever issued under this or the first named order for money received, but in January and February, 1896, other certificates were issued in payment for labor and material to the amount of $5415.15, as shown by Exhibit D, hereto annexed" (see p. 81).

Besides the certificates issued for labor and materials the sum of $2,500 was borrowed in pursuance to an order of the Court, dated November 19, 1896, which is found at pages 39–40 of the Record.

> " Ordered that the said E. C. Chapman, receiver, be and he is hereby authorized to make and issue receiver's certificates to the further amount of twenty-five hun-

dred ($2,500) dollars to run for such period of time as he shall deem necessary and to bear interest at such rate as he shall find necessary in order to raise moneys thereon, not to exceed ten per cent per annum ; such *receiver's certificates, together with those already heretofore issued as aforesaid to constitute a first lien on the property of said defendant held by said receiver, payable out of the first moneys received from the sale of said property,* and the same or the proceeds thereof to be used by said receiver for the payment of taxes upon said property and of the current and necessary expenses for the management and care thereof."

Here again it will be noticed that there was no provision for any personal liability upon the certificates. Here again they drew 10 per cent. interest, a rate of interest which would never have been thought of had any personal liability on the part of the Atlantic Trust Company been supposed by investors to stand behind the proposed loan (p. 142).

It will be further noticed that the $5,415.15 of receiver's certificates issued as above stated were issued *without any prior authority from the Court.* Had they been issued for cash they would have constituted an overissue ; and they were issued for labor and materials (p. 76). They were, however, since confirmed by the decree (p. 88).

The total amount of cash received upon receiver's certificates was $4,850, and the total sum of certificates issued for cash, labor and material was $10,265.15 (Receiver's Report, p. 77).

III. The Receiver's Time Checks.

In addition to the certificates mentioned, the receiver issued from time to time certain quasi certificates, designated as "time checks" for labor, aggregating the sum of $5,728.89 (pp. 89, 116, 131, 153).

They were simply a form of receiver's certificate issued without prior order of the Court (see *supra*). Their precise language does not appear, but the name implies that they are statements signed by the receiver to indicate the

amount of time spent by each person furnishing labor (see List at p. 89).

They stand in the same position as the certificates, except that they did not carry interest, until after the final decree of foreclosure, from which date interest at seven per cent per annum was allowed by the order appealed from (p. 153).

The time checks like the certificates, did not purport to constitute any liability on the part of the complainant (Answer, p. 131).

IV. Open Accounts.

The receiver incurred indebtedness to sundry persons for work done and materials and board furnished for men, for which no time checks or certificates were issued, amounting to the sum of $2,269.85 (pp. 90, 116).

This sum was included in the judgment appealed from, with interest from the date of the final decree of foreclosure at seven per cent per annum (p. 153).

V. Supplemental Accounts.

Between the date of the judgment of foreclosure (September 18, 1897) and the confirmation thereof (August 15, 1898), the receiver remained in charge of the property and incurred indebtedness to sundry persons for the care thereof, amounting to $1,028, and made certain disbursements to the amount of $529.40 (pp. 116, 154).

These items were admitted by stipulation in open Court as correct (p. 152), and were included in the judgment appealed from.

VI. Receiver's Advances.

The Receiver made advances in the administration, care and management of the property pending the suit of $6,605.72 and received $3,500 on account thereof (p. 88), leaving a balance due him of $3,105.72. This was included in the judgment appealed from, with interest at seven per cent. from the date of the judgment of foreclosure (p. 153).

VII. Disasters.

The expenses were largely and unexpectedly increased by a disaster which occurred to the company's dam on July 23, 1895, when,

> " without any warning or means of prevention, the " river undermined the easterly portion of the dam " and carried away the east abutment thereof. This " caused the river to change its channel and flow over " the land formerly occupied by the abutment " (Receiver's Report of Aug. 10, 1897, p. 75).

The dam was repaired by the farmers and others dependent on the water supply, of which expense $5,415.15 was paid by the issue of Receiver's certificates, as above mentioned (*id.*, p. 76).

Up to this time there appears to have been no doubt in the Receiver's mind as to the advisability of these repairs. He decided the question on his own responsibility and does not claim to have consulted the Court or the complainant at this juncture. We do not wish to be understood as criticising his action. We think there was strong ground for it, *although not in the complainant's interest, but in that of the general public, which this quasi-public corporation was bound to serve.*

As will be seen, the future disasters were due either to the insufficiency of the repairs made by the engineer selected by the farmers or to the fact, which by this time the Receiver ought to have discovered, had he selected an engineer more competent, that the whole enterprise was bound to end in disaster unless the location of the dam were entirely changed.

As no report was made to the Court by the Receiver until more than a year after this accident of 1895, it may be inferred as a fact that, as he was advised and believed, there was no reason whatever to doubt that the *property would amply repay the expenses of the suit and of the receivership.* He remained evidently of the same opinion at the time of his fourth report, a few weeks before the final decree.

On July 26, 1896, came the second and more serious disaster to the dam.

> "On this last-named day the dam was again undermined at the same place where the river broke through the preceding year. It was thought by the engineer in charge, upon the completion of the repairs, that it would be impossible for the river to undermine the dam again, as he claimed that the sheet piling was driven far down into a bed of blue clay which was supposed to form the bed of the river. But the fact that the river undermined the same is proof that his opinion was not correct. The foundation of the dam and the superstructure thereof still stand intact but the sheet piling, by which the water is prevented from flowing through or under the dam, is not sufficient to hold the waters of the river. I am informed by civil engineers that there is a well defined bed of clay in the bed of the river at the place where the dam was constructed, but from my experience with this work of repair and the result thereof, I am led to believe that it is not as good as it should be for such a dam as was constructed, and that thereafter it will be wise to make repairs on the theory that there is no bed of blue clay under the river" (p. 38).

The receiver now at last decided to act no longer upon his own responsibility and the advice of the farmers and of the engineer Pidge, but to apply to the Court. On August 13, 1896, between two and three weeks after the disaster, he filed his third report, informing the Court of the two breakdowns and of the amount of expenses thus far incurred, together with the indebtedness incurred by him by reason of the receiver's certificates and timechecks and cash loaned (p. 38). *In describing these it is noticeable that he does not make any suggestion of having received assistance through any credit given to the complainant.* The expenses not paid for out of earnings or receiver's certificates are stated to have been

> "paid by time checks issued to employees for labor and by cash raised *upon my own personal credit* and advanced for the purposes aforesaid."

The then present situation he describes as follows :

> " By reason of this last washing away of the dam, farmers, holding water rights for about three thousand acres of land, have been cut off from the use of water at a time when it occasioned a loss of about one-third of their income from their lands for the current year, and unless the dam can be restored before the winter rains, will deprive them of water for the ensuing year ; the value of the works and property will be very greatly depreciated and much loss will necessarily occur to all parties interested. *I am unable to raise further funds on receiver's certificates.* The farmers are not inclined to make further contributions, and the property, if offered for sale, would not, in my judgment, in its present condition, bring anything near its worth, and yet the longer it remains in its present condition, the more it is likely to depreciate. The water of the river has not gone down sufficient as yet to enable us to determine the extent and nature of the repairs necessary to restore the structure and preserve the efficiency of the works, but in my judgment it will require from $2,000 to $5,000 to accomplish the same."

While he does not distinctly and affirmatively say so, his opinion is evidently that the property ought to be repaired. His recommendation is that (p. 39)—

> " in my judgment the time has come when, in order to preserve the property, *some steps must be taken by the parties interested in the property for supplying funds* for its protection, care and repair, *or* some order of the Court should be made for the final disposition thereof."

Clearly he represented to the parties and the Court that all parties interested regarded the expenses theretofore incurred as not involving the credit of " the parties interested in the property."

The situation now appeared to the Receiver sufficiently grave to apply to the Court to terminate the Receivership and sell the property on the ground that it was " constantly suffering and

"depreciating in value for want of funds" (p. 35) and a motion was made to that effect.

The complainant obtained adjournments of the hearing from time to time for about three months, but it is not claimed by the Receiver that he said anything to intimate that injury would be caused by this delay. The irrigation season was over. If repairs were to be made, it was sufficient that they should be made in time for the season of the following year, and action was delayed as he says "in view of an anticipated early final decree in this cause" (p. 76).

This hoped for result was prevented by delays caused by the vexatious interventions which will be next referred to. And the motion terminated in an order of the Court (McKenna, J.) authorizing the issue of $2,500 additional Receiver's certificates for the payment of taxes and current and necessary expenses (Order of Nov. 19, 1896, p. 39).

By the expenditure of this sum, together with such other sums as were available to the Receiver, the dam was repaired and rebuilt, the regular channel improved "to prevent further breakage," and (p. 78):

> "Besides this, the canals, locks, gates and ditches have been put in and are now in better condition than ever before."

VIII. Interventions.

From the outset of the litigation numerous complicated and vexatious interventions occurred delaying the entry of the final decree. The litigation over them was active as is fully set forth in the answer to the Receiver's petition (p. 135), and shown by the entries in the Clerk's docket (pp. 81-86). These interventions required extended investigation into questions of fact and arguments upon difficult questions of law, which were taken under advisement by the Court for considerable periods of time, and as to which ultimately the complainant was in part, and certain of the intervenors, in part successful. Various decisions of the Court thereon will be found reported in 79 Federal, 39; 79 Federal, 842; 86 Federal, 975; 86 Federal, 975; to which reports the appellant begs to refer.

One of the most important of these interventions was that of P. A. Buell & Co. and eight others, who sought recognition for certain bonds issued as collateral security only. They were admitted as parties defendant June 12, 1896 (p. 72). The legality of these bonds was disputed.

The Buell intervention raised an issue of fact which had to be tried, and was finally submitted on a stipulation, November 30, 1896. It was decided favorably to the intervenors on April 5, 1897 (p. 72). The opinion of the Court will be found at 79 Federal Reporter, 842.

We will not burden this statement with details of the other interventions. Their history is fully narrated in the sixth clause of the answer at pages 134-137, and fully sustain the allegation at page 137:

> "Examination of the clerk's docket will show that the delays in this case, which resulted in the lapse of nearly three years between the filing of the original bill of complaint and the entry on the final decree were almost entirely due to the interposition of these various bills of complaint and the petitions in intervention and these delays thus caused without fault on the part of this complainant caused the expenses of the receivership."

The amended bill of complaint had been taken *pro confesso* on March 5, 1896 (p. 62), and it is apparent from an examination of the clerk's docket that the parties were doing their best to bring the case to a final decree. It was finally wound up on August 9th, 1897, by the opinion of the Court (MORROW, J.) reported in 86 Federal Reporter, 975, to which we refer the Court as a clear resumé of the litigation and the final disposition of all the interventions and other controverted questions. The Court granted the motion for a final decree in favor of the complainant and the application for an order of sale was allowed.

IX. THE FINAL JUDGMENT OF FORECLOSURE.

On the day following the filing of this decision, August 10, 1897, the receiver filed his last report, which had been verified

on June 17 (pp. 73–81). There is nothing in this report to indicate that he felt any doubt about the recovery of his fees and expenses out of the property. He claims that his expenses of management have (notwithstanding all of the extraordinary disbursements) averaged less than half of those of the prior period (p. 77). He asks for an order (p. 80)

> "allowing a just and reasonable compensation to me as receiver for my services in this cause and providing for the payment thereof, and that a like order be made fixing and allowing a just and reasonable compensation for my counsel for his services as such and providing for the payment thereof; and that my accounts of receipts and disbursements as shown herein and my actions as such receiver be approved."

The matter was referred to a Master, who reported on September 2nd, and after some further incidental proceedings the final decree of foreclosure and sale was entered on September 18th, 1897 (pp. 86–108). It adjudges—

That defendant was in default and the mortgage a valid lien upon the preperty ;

That the cost and expenses of the foreclosure and the management and care of the property pending the action are as follows—

(a) Receiver's advances ;

(b) Receiver's certificates ;

(c) Receiver's time checks ;

(d) Money advanced by various persons for labor, materials and workmen's board " for which no time checks or certificates have been issued " ;

(e) Receiver's fees ($9,000) ;

(f) Receiver's counsel fees ($9,000) ;

(g) Claims for labor and materials furnished prior to suit ;

(h) Pidge's claim for services as engineer prior to suit ;

(i) McClelland's claim for services in keeping canals in repair ;

(j) Complainant's costs ($9,000) ;

(k) Costs of the Buell intervenors ($2,000).

That the items *(g)* to *(k)*, inclusive, were to be postponed to the others.

That after payment of the above sums the 79 bonds found to be valid should be paid out of the residue *pro rata*. These bonds were identified by number. Comparison with the Buell petition (p. 65) shows that they included, besides those represented by this complainant, the 12 bonds of the intervenor P. A. Buell & Co. The 15 remaining bonds were to be prorated to the extent of the amount actually advanced upon them.

That the Thompson intervention be dismissed.

That the other interventions be dismissed except in so far as they had been provided for among the preferred claims.

That the property be sold under the ordinary provision for sale under foreclosure, and payment out of the proceeds of the amounts due as above.

That the deed should be delivered to the purchaser "six months after confirmation of sale if no redemption thereof has been made" (p. 96); and that the purchaser should be let into possession upon confirmation.

Appointment of Commissioner to make the sale, with provision for his bond.

Particular description of the property to be sold.

Recovery of costs from certain intervenors.

The only reservation of jurisdiction in the decree is as follows (p. 107)—

> "This decree is given and made subject to modification by the Court at any time before final confirmation of sale, as to the upset or minimum price at which said sale may be made, and also as to the manner of sale of personal property or choses in action or securities thereunder; and subject to the right of the Court at any time before the sale to authorize the withdrawal of choses in action and securities from sale and the settlement, compromise and cancellation thereof."

X. Decree of Confirmation of Sale.

The subsequent proceedings as set forth in the "decree of confirmation of sale" which was entered August 15, 1898, and is set forth at pages 108–113 of the record. It appears that the commissioner offered the property several times for sale, and that there were bids, but that none of them were accepted by

the Court until Mr. Fox, the receiver's counsel, submitted a bid in his own name of $21,000 to be paid as follows : $3,000 in coin and $18,000 by filing satisfaction pieces of his own allowance and that of the receiver, these allowances as above stated having been $9,000 each. On August 10, 1898, the matter came into court, and Mr. Fox then asked leave to substitute for this bid a duplicate thereof signed by one G. Howard Thompson instead of by himself (p. 110). The Court decided after a hearing that these two allowances of $9,000 each (*e* and *f supra*) were entitled to priority of payment over the other first preferred claims (*a*, *b*, *c* and *d supra*) and therefore approved the bid, fixing the period of redemption at " six months from the said tenth day of August, 1898 " (p. 112). The Court further decided that the receiver's certificates came next in order among the first preferred payments, and that therefore, after paying the costs and the two $9,000 items, the balance (which turned out to be only $490.70) should be applied *pro rata* upon the certificates and that the clerk should report to the Court the balance due upon the other preferred items " for the further consideration and action of this Court thereon " ; and that the receiver should report between the date of foreclosure and the date of sale and transfer of possession thereunder " for examination and settlement."

Here at the close of the " decree " came the final clause which was considered by the Court below, as a reservation of jurisdiction to enter the judgment appealed from.

> " and it is further ordered, that jurisdiction of this
> " cause and the parties thereto be and the same is
> " hereby retained by the Court, until redemption is
> " made or title deeds have passed as herein provided,
> " and until the coming in of the reports of the said clerk
> " and receiver herein provided for, and the final action
> " of the Court thereon, and the final payment of the
> " balance of the costs and expenses of this Court and
> " its officers, and of the advances made and indebted-
> " ness incurred by said receiver which have been or
> " may be allowed by the Court, in the management and
> " care of the property placed in his charge, or until the
> " further and final order of the Court in that behalf "
> (p. 112).

XI. Final Report and Petition of Receiver.

The period of redemption expired February 10, 1899. The period for appeal expired August 15, 1899. The petition which instituted the present proceeding was verified and filed by the Receiver August 3, 1899, but he applied for no order to show cause thereon until November 18th of that year. It was not until the time to appeal as well as the time to redeem had expired, that the present claim of the Receiver was developed. The consequence is shown in the Twelfth clause of the answer, which is as follows (p. 142) :

> "And this complainant further shows that neither the receiver nor his counsel nor any of the holders of said certificates, time checks or claims gave notice to this complainant of any claim of personal liability on the part of the complainant for any of the matters set forth in this petition until the filing thereof, nor has any person up to this date given such notice except the receiver and his counsel ; and that by reason of such silence on their part this complainant permitted said claims to be adjudicated by said decree of September 18, 1897, without the opposition which would have been made had any claim of personal liability been raised, and in particular permitted the illegal and unauthorized receiver's certificates hereinbefore described to be confirmed by said decree and took no appeal from the decree in that regard."

As has been previously noted, the submission as upon bill and answer, has eliminated all controverted allegations of the petition. All that the Court considered are the undisputed facts, contained in the petition and the facts properly pleaded in the answer.

See Opinion of Gilbert, J., p. 169.

Particularly the charges of collusion and fraud constituting the "further and different reasons why the plaintiff should be compelled to pay all the costs and expenses" (p. 117) are entirely eliminated, and the Receiver's claim rests exclusively on the proposition that because the fund has proved insuffi-

cient to cover his fees and expenses he is entitled to the relief demanded.

His prayer for relief is as follows:

> "Wherefore your petitioner, the said Receiver, prays this Honorable Court that the balance due him on account of his receipts and disbursements since the making of said decree, and also the balance due to his employees as hereinbefore stated since the making of the report upon which said decree was based, and the compensation to be allowed to the said Receiver, and to his counsel since the date of said decree, be fixed and established by this Court, and that judgment be entered in favor of this Receiver, or of the clerk, or such other officer of the court as the Court shall direct against the plaintiff in this cause for the full amount of the deficiency hereinbefore stated, with the sums so allowed for services and expenses since the date of said decree, and that the proper process of Court be issued for the collection thereof from plaintiff, and that when collected the same be paid into court to be by the Court disbursed to the several persons entitled thereto."

XII. The Answer.

Besides categorical denials of the charges of collusion or fraud, or deception of the Court, or representations, the answer incorporated by reference considerable portions of the record of the case. It pleads that the defendant was a quasi-public corporation, and that all of the expenses were incurred by the Receiver as the officer and hand of the Court, and not as the agent of the complainant, and were not incurred at the request nor for the benefit of the complainant, but for the benefit of all concerned, including the public, and that all such expenses were adjudicated by the Court by the final decree of foreclosure and made payable by said decree out of the proceeds of sale and not by complainant personally, and that the judgment of foreclosure was *res adjudicata* as to the method of payment of said expenses, and that the Court was without jurisdiction to make any order, judgment or decree, adjudging the complainant to pay the same or any portion thereof (pp.

129-134, 140-1). The answer further sets forth fully the history of the litigation and the delays caused by the intervention and disasters (above referred to), and the good faith of the complainant trustee in all the proceedings (pp. 134–143); facts showing laches on the part of the Receiver, and that the equities are on the side of the complainant (p. 142); the non-joinder of the intervenors and other bondholders, for whose benefit the suit was commenced (pp. 142–3), and submits that the Receiver is not entitled to the relief demanded.

XIII. Judgment Appealed From.

The amended decree now appealed from not only holds the complainant responsible for the entire deficit, but confines the responsibility to the original complainant, letting out altogether the intervenors who were allowed to come in as parties on the same side with the complainant and who, as the answer avers, should be made to contribute (pp. 142–3).

It will be found in full at pages 151-154.

It is entitled in the original cause and designated:

Ameuded Judgment and Decree.

In proceedings supplementary to decree of foreclosure and decree of confirmation of sale under said foreclosure, had on final report and petition of E. C. Chapman, Esq., receiver in said cause, praying for settlement of his final account, and for the ascertainment and determination of the amount of the unpaid balance on account of moneys advanced by said receiver and on receiver's certificates issued by him as such under the order of this Court and consented to by the plaintiff in this cause, and on time checks issued by him for work and labor done, and for materials furnished and board of men, etc., all of which was allowed and ordered paid by this Court in and by the original decree of foreclosure entered herein on the 18th day of September, 1897, and also for the ascertainment and settlement of the further amount due to said receiver on account of further expenses and liabilities incurred for work and labor performed for him after the said decree of foreclosure, and while the mortgaged property still re-

mained in his charge and under his care as such receiver; and praying that judgment be given and made and entered herein, against the Atlantic Trust Company, the plaintiff in this cause, at whose instance and on whose motion the said receiver was appointed and expenses incurred, for the full amount of the balance so ascertained and determined to be due and unpaid, the same to be paid into court and distributed to the several parties or persons entitled thereto as the Court should direct.

It recites the previous demurrer proceeding and reversal by the Circuit Court of Appeals, the subsequent proceedings and hearing upon the report and petition and answer and judicial notice of certain records and files, which are enumerated; the stipulations as to certain items of expenditures subsequent to the judgment of foreclosure, and the waiver of further compensation by Receiver and counsel. It finds the amounts due the Receiver (as previously set forth herein) "for all of which under the laws and the facts "in this case, the plaintiff and complainant herein, the "Atlantic Trust Co., is liable," and adjudges as follows (p. 154):

"And it is further ordered, adjudged and decreed that judgment be, and the same is hereby, given, made and entered, in favor of said E. C. Chapman, receiver in this cause, against the complainant in this cause, The Atlantic Trust Company, for the said sum of thirty-six-thousand two hundred and seven $\frac{57}{100}$ ($36,207.57), with interest thereon from this date until paid at the rate of seven per cent. per annum together with his costs in this supplementary decree proceeding taxed at the sum of $173.55, the same to be paid by said complainant into court within 120 days from the date hereof, in lawful money of the United States, and if not so paid, then the receiver, said E. C. Chapman, to have execution therefor, for the full amount of said judgment and costs with interest on the principal sum as above provided, and upon collection thereof the amount so collected to be paid into court and the clerk of said court to distribute and pay the same over to the several parties entitled thereto, as shown by the decree of

foreclosure entered herein, and by the allowance now herein made upon settlement of payment or collection and payment into court that the said E. C. Chapman be finally discharged as such receiver."

Specification of Errors.

The assignment of errors is set forth at pp. 156–159 of the record.

We contend that the decree is erroneous in each and every one of the provisions by which the following amounts are charged personally upon the complainant:

"I. Deficiency remaining unpaid on account of receiver's certificates theretofore issued by said receiver in this cause."

"II. Deficiency remaining unpaid on account of advances made by said receiver in the care and management of the mortgaged property."

"III. Deficiency remaining unpaid on account of time checks issued for work and labor, held by divers persons and allowed in and by the said decree of foreclosure."

"IV. Deficiency remaining unpaid to divers persons for work and labor done, materials furnished and for board of men employed on said work allowed and ordered paid by the said decree of foreclosure."

"V. Deficiency remaining unpaid on account of advances made by said receiver in the care and management of the mortgaged property after the decree of foreclosure, and while the same remained in his charge and care, and on account of the advances made by said receiver to F. G. McClelland for services, work and labor during the same time, and on account of the advances made by said receiver to J. J. Hinckley for services rendered during the same time."

"VI. Together with interest on each and every one of the above amounts."

We also specify the following errors:

"VII. In not holding that the decree of foreclosure is *res adjudicata* as to the method of payment

of the items therein set forth, and that the Court had no jurisdiction to make any further order, judgment or decree with reference thereto, or to make any order, judgment or decree, ordering or adjudging that the complainant pay the same or any part thereof."

"VIII. In not holding that so long as the decree of foreclosure herein remains unopened, the Court had no jurisdiction to enter any order or decree *in personam* against this complainant, directing it to pay any part of the fees, expenses, certificates, time checks or other obligations aforesaid, but that they are collectible only out of the property under foreclosure."

"IX. In not holding that the receiver is barred from maintaining this proceeding by his laches and inequitable conduct in the premises."

"X. In not requiring the bondholders whose names are given in the 13th clause of the answer to be cited and made parties to the hearing upon the receiver's petition for judgment against this complainant."

The last specification, resting as it does in discretion, is not intended to be urged upon this appeal.

Questions Involved.

Two questions are presented by this Record:

I. *Is a complainant, who has in good faith prosecuted a suit upon a good cause of action, and upon whose application the Court has properly appointed a Receiver, and who obtains a decree fully establishing his rights, nevertheless personally responsible for a deficiency caused by the failure of the property which is the subject of the suit to bring enough to cover the allowances which had been made by the Court to the Receiver and his counsel, and the expenses which the Receiver, supported in part only by a direction of the Court, and without special request of the complainant in any instance, had incurred?*

II. *After a decree of foreclosure, and without reopening that decree, has the Court any jurisdiction to charge the expenses of the suit personally against any party thereto, unless jurisdiction to do so had been in some way reserved in the final decree?*

ARGUMENT.

I. By the submission "as upon bill and answer" the Receiver has admitted the truth of every allegation of the answer, and abandoned every controverted allegation of his petition.

The authorities upon this point are clear, and it was conceded by the Court below (Opinion of Judge GILBERT, p. 169).

Daniells Chan., Pl. & Pr., 6th Am. Ed., 829.
1 Ency. Pl. & Pr., 924.
Equity Rule 41.
Reynolds vs. Bank, 112 U. S., 405, 409.
Banks vs. Manchester, 128 U. S., 244, 251.
Leeds vs. Insurance Co., 2 Wheat., 380, 384.
In re Sanford Fork & Tool Co., 160, U. S., 247, 257.
Lake Erie & W. R. Co. vs. Bank, 65 Fed. Rep., 690.
U. S. vs. Flournoy Co., 71 Fed. Rep., 576.
Grether vs. Wright, 75 Fed. Rep., 742.
In re Waugh, 153 Fed. Rep., 281.

The answer becomes the only evidence the defendant needs in such case, but the Court also took judicial notice of certain records and files of the Court which are enumerated in the decree (p. 152), and are printed in the record, and of certain admissions in open court touching the supplementary expenses of the Receiver.

II. The Circuit Court was without power to compel the complainant to pay the deficit of a receivership which was in all respects regular, after final judgment in complainants' favor.

This writ of *certiorari* brings up for review the whole record, and this Court is not limited to questions to which the Circuit Court of Appeals was limited on the second appeal,

but may review the entire case, including the decision rendered on the first appeal.

Panama R. R. vs. Napier Shipping Co., 166 U. S., 280.

The Receiver's claim is based in his petition upon three grounds (pp. 116, 117):

1. That the items in question "are costs and expenses of "this Court and its officers necessarily incurred in the prosecu- "tion of said action and for which the plaintiff in said action "is primarily liable under the laws of the United States and "of the State of California and the rules and practice of the "Court."

2. That said expenses "were incurred on the motion and "the request of the said plaintiff; that of right they should "have been paid in advance by the said plaintiff, but upon "the assurance of said plaintiff that the property against "which it was seeking to foreclose was amply sufficient to pay "all the costs and expenses so incurred, and the whole amount "of the indebtedness for which said action was brought, they "were not so paid but were left to be paid out of the funds "arising from the sale of said property; that the proceeds of "such sale were wholly insufficient to pay even the costs and "expenses of the court in that behalf and that after applying "the proceeds of sale to the satisfaction of the costs and ex- "penses of sale, and of the compensation allowed to the said "receiver and his counsel in and by the said decree of fore- "closure, as authorized by the Court, the amounts hereinbe- "fore stated remain still unpaid and entirely unsatisfied."

3. "For other, further and different reasons" that by reason of alleged collusion between the complainant and the defendant, the appointment of the receivers and the continued custody of the property by the Court were fraudulently procured and hence the Receiver could lawfully look to the complainant for all expenses.

This latter cause of action has been abandoned by the Receiver, in view of the positive denials of the answer, and is eliminated from the case on this appeal.

So, also, with the allegation that the costs and expenses were incurred upon the motion and request of the complainant

or upon any assurance of the complainant as to the sufficiency of the property to pay such expenses.

Judge GILBERT's opinion (Record, p. 169) states the effect of the former decision in 119 Fed. Rep., 257 :

> "This Court adjudged that the demurrer should have been overruled and held that where the costs and expenses of the management of mortgaged property by a receiver in a suit, which costs and expenses were authorized by the court and exceed the proceeds of the property when sold, together with its earnings and the court has expressly retained jurisdiction over the subject matter and the parties until the final settlement of the receiver's accounts, it has power on such settlement to render a judgment for the deficiency against the complainant at whose instance the receiver was appointed and continued and the expenses incurred."

It will be noted that the receivership expenses are here called, as in the judgment (p. 88), "costs and expenses of the management" and not "costs of the suit"—which was the Receiver's contention below. They are certainly not costs between parties—and costs of administration are not taxable as costs of suit.

> St. Louis vs. St. Louis Gas Co., 11 Mo. App., 243 ; affd. 87 Mo., 224.

There is no inherent power in any Court to award costs, in the absence of statute, and where costs are authorized by statute, *they follow the judgment and are taxed to the losing party*, as was done in this case (Final Judgment, pp. 88, 107 ; *Wallace vs. Sheldon*, 76 North W. Rep., 418 (Nebraska) ; *In re Commissioners*, 20 App. Div., 271 (New York) ; *In re City of Brooklyn*, 148 N. Y., 107).

Priority is given to the *compensation* of Receivers and their solicitors over Receiver's certificates, and such allowances have sometimes been called "costs of the proceeding to be paid out of the fund" *(Petersburg Savings Co. vs. Dellatorre*, 70 Fed. R., 643 ; *Radford vs. Folsom*, 55 Iowa, 276).

There is no suggestion, however, that they can be taxed

against a successful party, and in the present case, the Receiver and his solicitors have been paid (p. 113).

The receiver's counsel has in prior arguments urged certain provisions of the California Code. It seems unnecessary for us to discuss these, since the equity practice of the Federal Courts is uniform throughout the United States and does not in any respects follow that which prevails in the various localities (1 Foster's Fed. Prac., 3d ed., pp. 10-12, 120-1; *Boyle vs. Zacharie*, 6 Pet., 648, 658; *First National Bank vs. Ewing*, 103 Fed. Rep., 168, 194; *Kirby vs. Lake Shore R. R.*, 120 U. S., 130, 137; *Goodyear Co. vs. Dancel*, 119 Fed. Rep., 692; *Phinizy vs. Augusta Railway Co.*, 98 Fed. Rep., 776). Even in common law actions, costs are not governed by provisions of State legislation (*U. S. vs. Treadwell*, 15 Fed. Rep., 532).

When the Receiver's application came first before Judge Morrow it was dismissed by him upon the following ground, which we shall maintain is still the true rule of law applicable to this case:

> "I am of the opinion that provision should have been made when this suit was commenced, or at the time when the receiver was appointed, for the payment of or security for the amount of his expenses, and for the redemption of whatever certificates might be issued by him, in the event that the proceeds of the sale of the property should prove insufficient. But such provision was not made at the time by the Court, and I am of the opinion that the Court is without authority to do so now. In Farmers' Loan Co. vs. Oregon Pacific R. R. Co., 31 Or., 237, this question was fully considered, and the views there expressed are in accord with my opinion in the present case."
>
> (Cited in 119 Federal, at p. 267.)

Prior to the decision of this case, the only authority directly in point was that which was approved and followed by Judge Morrow, namely, *Farmer's Loan & Trust Co. vs. Oregon Pacific R. R. Co.*, 31 Oreg., 237 (also reported 48 Pac., 706; 38 L. R. A., 424; 65 Am. St. Rep., 822). The gist of the argument is incorporated in the opinion of Judge Ross, found

at 119 Federal at page 268, and was dismissed with the remark that it "does not commend itself to our judgment."

We cannot state the reasoning for our contention better than in the words of Judge BEAN of the Supreme Court of Oregon, in the case above cited. While the learned Judge was speaking of a railroad receivership, his reasoning applies equally to every Receivership impressed with public or quasi-public duties as is the case of water or irrigation companies.

> "The contention of the petitioners seems to be that a Receiver of a railroad appointed in a suit to foreclose a mortgage on the road, clothed with authority to operate it, is as much the representative of the plaintiff as a Sheriff who levies upon property under a writ of attachment, and that the operating expenses incurred by him are costs or fees of the litigation, and, like the fees of the Sheriff in the case referred to, are collectible from the plaintiff. But this argument is based upon an entire misapprehension of a railroad Receivers' position and duties. He is not, like a Sheriff in an attachment action, the agent of the plaintiff to the litigation, nor does the plaintiff have any control or authority over him whatever. He is agent and executive officer of the Court, which, by virtue of its high prerogative powers, lays its judicial hand upon the property which is the subject of controversy and controls and operates it for the use and benefit, not of either of the parties to the litigation, but for the public and whomsoever in the end it may concern. His acts and possession are the acts and possession of the Court. His contracts and liabilities in contemplation of law are the contracts and liabilities of the Court. The parties to the litigation have not the least authority over him, nor have they any right to determine what liabilities he may or may not incur." * * *
>
> "A railroad Receiver is, therefore, more than a mere custodian of the property, like a Sheriff holding under a writ of attachment or execution. He is, in effect, the hand of the Court, which holds the property while it operates the road pending the litigation for the benefit

of the general public, as well as the creditors of the insolvent corporation. It is for this reason that the expenses of the receivership are chargeable as a lien upon the property superior to all other liens. The plaintiff, at whose instance the Receiver is appointed, thereby consents to the absolute control and management of the mortgaged property by the Court and its agents and to the priority of claims for the expenses incurred in its operation and management; but it is not perceived upon what ground it can be claimed that, because the expenses of the receivership are allowed without any fault of his to exceed the value of the mortgaged property, thus entirely destroying his security, he must, in addition to the loss of his debt, be compelled to make good the deficit, unless the order of appointment was made upon that condition. He has no control over the acts of the Receiver, and if without his consent he is to be held responsible therefor, he is liable to absolute bankruptcy and ruin. Such a rule would render the plaintiff's position so uncertain and precarious as practically to preclude him from any protection whatever through the appointment of a Receiver pending the foreclosure suit. But the inquiry is made, 'shall not a railroad mortgagee who applies for and obtains the appointment of a Receiver, with authority to operate the road, be held responsible for the liabilities incurred by such officer when they cannot be made out of the property itself?' We think not, unless such responsibility was imposed as a condition to the appointment or the continuance of the Receiver in office. The appointment of a Receiver in a suit to foreclose a railroad mortgage is not a matter of strict right, but rests in the sound judicial discretion of the Court; and it may, as a condition to issuing the necessary order, impose such terms as may under the circumstances of the particular case, appear to be reasonable, and, if not acceded to, may refuse to make the order (30 Am. L. Rev., 161; Fosdick vs. Schall, 99 U. S., 235, 25 L. Ed., 399). If, therefore, upon an application for the appointment of a railroad Receiver, it appears probable that the income and

corpus will prove insufficient to pay the expenses and liabilities thereof, we have no doubt that the Court may require of the plaintiff, as a condition to such appointment, a guaranty of the payment of the expenses of such officer. And if, at any time after the appointment has been made, it becomes apparent to the Court that it will be unable to pay and discharge the present or future liabilities incurred by its executive officer and manager, it should refuse to continue the operation of the road under the Receiver, unless its expenses are guaranteed. No Court is bound or ought to engage or continue in the operation of a railroad or any other enterprise without the ability to promptly discharge its obligations, and, unless it can do so, it should keep out, or immediately go out of the business. But, unless such terms are imposed as a condition of the appointment or continuation in office of the Receiver, his employees must look to the property in the custody of the Court and its income for their compensation. They have no claim whatever on any of the parties to the litigation. They are the employees and servants of the Court, and not of the parties. Their wages are in no sense costs of the litigation; and, although incurred during the progress of the suit, they are not incurred in the suit. They are neither expenses of the plaintiff, nor of the defendant, and are not fees or costs which can be charged against the successful party to the litigation, as is sought to be done in this case."

As against this well reasoned authority, the Circuit Court of Appeals stands alone, as we shall endeavor to show. And in view of the unbroken line of authorities, which we shall submit, it seems ironical for that Court to state (p. 171) "it "was not among his (Receiver's) duties to advise the appellant "of his understanding of its legal liability to him. *It was its* "*duty to know it.*"

We submit, however, that while there is so little authority directly in point upon either side of the question, there is a large amount of authority indirectly applicable, all of which is favorable to our contention, and which is of sufficient weight to be treated as establishing a rule of property. The

gist of Judge Ross' opinion (119 Fed., 257) is that while the Receiver is "not the agent of either party to the suit," "he is appointed to serve the parties interested," and that his appointment "is usually made at the request of the complainant," who, if the property was insufficient, "should not have asked the Court to make the appointment, incur the liabilities and pledge its faith to their payment," and that it was the complainant's duty "to keep informed," and if there appears to be a sufficiently serious risk of a deficiency, "to ask the Court to bring to an end the business it undertook and was conducting on complainant's petition."

It is a little difficult for us to understand what the learned Court thinks could have been done under such circumstances. The complainant could not be forced to receive the property and run it, nor would it have been proper to make such a disposition. The defendant was insolvent. The Court could hardly let go of the property prior to a sale. Meanwhile a competent and careful Receiver is the best judge of the propriety of spending money on it, and the person most obviously called upon to advise the Court whether to treat the property as a going concern or shut down work and thus reduce expenses to a minimum. Neither party can give any orders to the Receiver or in any way control his actions. He does not in any proper sense of the word "serve" them, or either of them. He is the bailiff of the Court, and during the pendency of the suit the Court is in adverse possession.

Judge MORROW, in the light afforded by the final sale of the property, says that there should have been provision made when the suit was commenced for the payment of any deficiency. The learned Circuit Court of Appeals say that they cannot see why, if the Court could at the beginning "compel the complainant to pay into court sufficient money to cover the expense of the receivership or to give security for such payment," it has "not precisely the same power to adjudge upon the settlement of the Receiver's account that the complainant make good any deficiency in the matter of such expenses." This is a curious misapprehension of Judge MORROW's position. We had not supposed that any one would suggest that a court of equity has general power to compel a complainant to pay or secure, either at the beginning of the suit or at the end of it, whatever expenses the Court in its

discretion might authorize its bailiff to incur. What was meant was that the Court should have refused to appoint a receiver, or refused to permit the property to be maintained in an expensive way, without prior indemnity by the complainant. *This would have given the complainant an option.* It would doubtless have led to independent investigation by the complainant, instead of reliance upon the wisdom of the Receiver and of the Court.

The learned Circuit Court of Appeals evidently considers that this is a case where one of two innocent parties must suffer because somebody did not have foresight enough to see that the property was not of sufficient value to warrant an expensive receivership, and comes to the conclusion that the suffering must be cast upon the absent trust company rather than upon the Receiver, notwithstanding that the latter was on the ground and charged with the duty of knowing all about the property.

It is submitted that there are two complete answers to this suggestion: First, that there is no principle in the law of agency or elsewhere upon which such a liability can be imputed to a complainant, whether the complainant or the Receiver may have been the party more responsible morally for the loss; and second, that the Receiver and his counsel, so far as their own compensation is concerned, and the recipients of certificates and time checks, so far as their compensation is concerned, are persons who must be presumed to have understood the risk which they were taking and to have secured payment for that risk. The situation is well described in the Brief of the late Wheeler H. Peckham of the New York Bar, filed in support of the first application for the writ of *certiorari* in this case (see RECORD, No. 557, October Term, 1902).

> "Without any express promise to assume this personal liability; without the existence of any facts from which such promise can be implied; with a judgment absolutely in plaintiff's favor; without the imposition of any condition upon which relief is granted; without any option ever having been offered to assume or decline any such liability, the Court below has imposed upon the complainant a personal liability for indebtedness and compensation of the Receiver.
>
> "It, too, has done this when the proceeds of sale

were sufficient to pay compensation to the Receiver and proved insufficient only because applied in priority to the payment of debts for which the Receiver was *not* personally liable."

Nature of Receiver's Certificates.

We take up first the Receiver's certificates, because they were given priority by the decree confirming the foreclosure sale (p. 112), and because the considerations which apply to them are largely applicable also to the other claims. For various different reasons we submit that the decree charging complainant personally with the deficit upon these certificates is erroneous.

The record shows that certain of the certificates were issued under the authority of the court and that careful provision was made as to the source from which they were to be paid, viz.: "out of the proceeds of sale of said property next after the costs of suit and sale" (pp. 35, 40).

No mention was made of any personal liability on the part of anybody.

The other certificates, issued without prior authority for labor or materials, stand upon the same basis as the Receiver's personal advances and his time checks. That they were regarded as investments involving great risk is confirmed by the fact that they bore interest at the high rate of ten per cent. in spite of the well-known financial standing of the Atlantic Trust Company.

The status of this sort of securities has often been before the Courts.

In Mercantile Trust Co. vs. Ry. Co., 58 Fed. Rep., 6, 15, the Court (TAFT, J.) said:

> "It is well established in the federal courts by numerous decisions of the Supreme Court of the United States that a court of equity, which, in foreclosure or other suits, has taken into its custody railroad property, may authorize its receivers to borrow money for the preservation, maintenance or necessary betterment

of the road, and may, by its order, *make the loans thus incurred a paramount lien on the income and corpus.*

" Wallace vs. Loomis, 97 U. S., 146.
" Union Trust Co. vs. Illinois M. Ry. Co., 117 U. S., 434.

" *The Court does not act as the agent for the parties in the sense that it creates the lien by contract of the parties with the lenders,* but, by virtue of its custody of the property and its jurisdiction of the parties, it pledges its own faith to the lender that it will enforce such *a lien against the property and the parties as a condition* of its releasing the property and of its enforcing any equities in favor of those who invoke its assistance. Now, it may enforce the lien in one of two ways: it may directly order out of the proceeds of sale the prior payment of the loans, or it may impose a continuing lien on the property by providing in its decree for sale that the purchaser shall take it subject to such a lien. * * *

" But the Court may order the sale of the property free of all liens, in which case the purchaser takes a title freed from the burden as well of Receiver's loans as of mortgage debts, *and the pledge of the Court that the Receiver's debts shall constitute a paramount lien can only be fulfilled by the Court in its distribution of the proceeds of sale.*"

In the first case in this Court on the subject, in 1854, Mr. Justice WAYNE said that the Receiver "is an indifferent person between parties," "an officer of the court"; that it "is the court itself which has the care of the property in dispute. The receiver is but the creature of the court" (*Booth vs. Clark*, 17 How., 322, 331). "He is not appointed for the benefit of either of the parties, but of all concerned" (*Davis vs. Gray*, 16 Wall., 203, 218). In the familiar case of a railroad receivership, as has been so often held in connection with receivers' certificates and with questions of priorities, "all concerned" include the public as well as the parties; and an irrigation company like the mortgagor in the present case is also a *quasi* public corporation (*Fallbrook Irrigation District vs.*

Bradley, 164 U. S., 112), so that the Court cannot be considered as having been operating this property for the benefit alone of the complainant, defendant and intervenors. *Non constat* but that had these parties all desired the preservation of the work to be abandoned the Court might have considered it in the public interest to disregard their wishes.

This Court has always maintained the position that a Receiver is an agent of the Court and derives no authority from the act of the parties at whose suggestion or by whose consent he is appointed (*Chicago Union Bank vs. Kansas City Bank*, 136 U. S., 223, 236; *Quincy, Missouri & Pacific R. R. Co. vs. Humphreys*, 145 U. S., 82, 97).

The lower Federal Courts have maintained the same doctrines (*Texas & St. Louis Ry. Co. vs. Rust*, 17 Fed. Rep., 275, 282; *Central Trust Co. vs. Wabash, St. Louis & Pacific Railway Co.*, 23 Fed. Rep., 863; *New York, P. & O. Ry. Co. vs. New York, L. E. & W. Ry. Co.*, 58 Fed. Rep., 268, 278). Thus in the Wabash case, where the receivers had been originally appointed upon the petition of the railway company, and the mortgagees afterwards applied for their reappointment as receivers in the foreclosure suits, Mr. Justice BREWER, then Circuit Judge, said (23 Fed. Rep., at p. 868), in overruling the application :

> "As we look upon it, the receivers are not receivers for either party. They are simply the hand of the court. In the process of the litigation the court has taken possession of the property, and holds it neither for the mortgagor nor the mortgagee, and it matters not, for the ultimate determination of the suit, at whose instance the receivers were appointed. They act for neither party. They represent neither party. They stand here simply as the hand of the court, holding the property for disposition at the end of the litigation, for the benefit of all. So I cannot see what can be gained as a legal proposition by a new order of appointment extending the receivership, as counsel say, to the trust company, the mortgagee."

The Receiver, thus being the agent of the Court and not the agent of either party, there is no legal principle upon which his contract may be treated as the contract of either party. This obvious fact has been often noticed in various ways. Thus, in *Turner vs. Peoria & Springfield R. R. Co.*, 95 Ill., 134, 145–6, decided in 1880, where the question raised was whether Receivers' certificates were negotiable, the Court held them non-negotiable upon the following reasoning :

> " Whether, in any event, they are payable in full depends upon the question whether the fund under the control of the court is sufficient for that purpose. That fact cannot be known except upon inquiry into the amount of such certificates issued by the officer authorized to act, and as to the value of the fund to be administered."

This case is referred to in all the text-books as authoritative. It was followed in 1883, in *McCurdy vs. Bowes*, 88 Ind., 583, 584–5, where the Court said that such a certificate " is the mere acknowledgment that a debt is due the payee, payable out of a specific fund."

Mr. Beach says, as to Receivers' certificates, that " there is no one personally liable for their payment " (*Beach on Receivers*, § 416). Mr. Smith says that such a certificate " is payable solely from the funds of the receivership, and that there is no responsible principal back of them to be made liable in case of default " (*Smith on Receivers*, § 287). Mr. High's statement is to the same effect (*High on Receivers*, § 398*c* & *e*).

In England, where Receivers' certificates do not seem to be used, the Receivers are personably liable unless special arrangements are made to the contrary. They are indemnified out of the fund, but the idea that the parties applying for Receivers are personally liable upon any theory seems never to have suggested itself (*Kerr on Receivers* [London edn., 1900], pp. 195, 208 ; *Burt vs. Bull*, L. R. 1895, 1 Q. B., 276, 279, 280, 282, 284).

Judge CALDWELL, of the Eighth Judicial Circuit, who had had wide experience in these matters, delivered an address on

"Railroad Receiverships in the Federal Courts," which was reprinted in the "American Law Review" in 1896, and has had wide circulation and citation, especially in the Western States. Speaking of the Receiver, he says positively that "neither party is responsible for his contracts" (30 American Law Review, 162).

"*The Pledged Faith of the Court.*"

Much stress was laid below upon the fact that the "faith of the Court had been pledged" to the Receiver and his creditors, and that it is the duty of the Court to see that the pledge is redeemed.

The only pledge that the Court made, or could lawfully make, was that the fund in Court would be impressed with a *paramount lien* in favor of the Receiver's creditors, and that it would enforce such *lien* against the property and parties as a condition of releasing the property.

See opinion Judge TAFT, 58 Fed. Rep., p. 15 *supra.*

> "The fund in the Receiver's hands is alone bound for their redemption, and their payment can be compelled only by an application to the Court by whose authority they were issued."
>
> *Beach on Receivers*, § 416.

> "The holders of these certificates must see to it that in the order distributing the purchase money, the proper provision is made for their redemption, because if once the property is sold, and the Court makes a final decree without providing for the payment of the certificates, there is in some sort an end of the matter. The receiver cannot then be sued; the court has no longer either the suit or the property under its control and is powerless to compel payment of such obligations."
>
> Beach, § 418.
>
> Alderson, § 344.

> "The certificates may not follow the property out of the court. But they constitutes a charge upon it in the particular cause enforceable in this court, and must be

satisfied or provided for before the property or the proceeds of it after the sale shall pass out of its control. The certificates are not debts of the company, but of the receivers, *backed by the pledged faith of the Court that the property on the proceeds of which they are charged, is in its possession, subject to be, and that it will be disposed of by it for the payment of them.*"

Meyer vs. Johnston, 53 Ala., 237, 348, 349.

"The most that can be predicated of them is that they are evidence in the hands of the holder that he is entitled to receive from the fund under the control of the Court that authorized its officer to issue them the amount specified, if the fund is sufficient to pay in full all holders of such certificates, or, if it is not sufficient, then only a *pro rata* share with other holders."

Turner vs. Peoria, &c., 95 Ill., 134, 145.

"A Court which appoints a receiver acquires by virtue of that appointment certain rights and assumes certain obligations, and the expenses which the Court creates in discharge of those obligations are *burdens necessarily on the property taken possession of*, and this irrespective of the question as to who may be the ultimate owner, or who may have the preferred lien, *or who may invoke the receivership.*"

Mr. Justice BREWER in *Kneeland vs. American Loan Co.*, 136 U. S., 89, 98.

Receiver's Time Checks, Advances, &c.

These stand in no better position than the Receiver's certificates. The time checks were mere certificates of indebtedness indicating the amount of time spent by each person furnishing labor and the amount due such persons (p. 89). Together with the amounts due on open accounts and the Receiver's own balance of account, they were placed upon a parity with the Receiver's certificates in the decree of foreclosure (pp. 88-90) to be paid next after the compensation of the Receiver and his counsel. But, as between themselves,

priority was given to the Receiver's certificates in the decree of confirmation (p. 112). They are in any event of no higher class than the certificates, and the same considerations above advanced apply also to them.

Among the time checks in the decree is classified a certain " Cert. of indebtedness for material " for $987.89 issued to the intervening co-complainant P. A. Buell & Co. (p. 90). By what seems to us a rather astonishing process of reasoning, this co-complainant, by the decree now appealed from, is to be allowed to recover the entire amount from the company into partnership with which he forced himself, after a litigation which was one of the causes of the unfortunate delays and disasters of this suit.

III. Costs of this kind, in absence of a statute, should in all cases be governed by equitable considerations, and upon the case now presented the equities are with the appellant.

(*a*) Upon the first appeal we presented the question as one of power. We contended, and do still contend, that under no circumstances could a complainant be forced (without prior agreement on his part to that effect) to pay a deficit of a receivership which was in all respects legal and in which the deficit had not been caused either by failure of title to the property taken by the receiver or by the existence of any prior lien thereon.

The question now arises whether the case made by this appellant, and which by his submission upon bill and answer the receiver has conceded that he is unable to controvert upon the facts, does or does not alter the situation.

(*b*) It will not be disputed that the question is to be decided upon equitable considerations. The contention of the receiver upon the prior appeal, which contention was sustained by the Court, was that the relief sought by him came within the equitable power of the Court, in its jurisdiction to fix the costs of the suit and decide how they should be

borne. His argument was founded upon the proposition that (*Chapman vs. Atlantic Trust Co.*, Appellant's Brief, p. 10)—

> "In such case the Court will be largely governed by the individual merits of the case, and exercise an equitable discretion in compelling the fund to bear the payment or those parties who in equity should pay the receiver's compensation in whole or in part, to do so as justice requires."

The Court below (119 Fed., 257) cited with approval the case of *Farmers' Natl. Bank vs. Backus*, 74 Minn. 264; S. C. 77, N. W. Rep. 142. That case held that as a general rule the party obtaining the appointment of the receiver is not liable for any deficit unless he has given a bond or contract as a condition of obtaining the receivership, but that there are exceptions; the exception then entertained being that the property had been wiped out by foreclosure of a prior lien, and that meanwhile (by suing upon the supersedeas bond given upon an appeal from the order appointing the receiver) plaintiff had come into possession of funds sufficient to wipe out the deficit.

Another case cited with approval by the Court upon the prior appeal was *Espuela Land Co. vs. Bindle*, 11 Tex. Civ. App. 262; 32 S. W. Rep. 582. In that case the receivership order had been held erroneous *ab initio* upon appeal. The Court nevertheless charged the fund with the expenses of the receivership in the first instance, leaving it open for defendant to apply for their imposition upon plaintiff as part of the taxable costs, saying:

> "that costs of this kind, in absence of a statute, should in all cases as between the parties be adjudged upon equitable principles."

In the *Ephraim case*, 129 Cal., 589, 592, which was the first case cited by the Court below in its opinion, and where upon demurrer it had appeared that the Receiver was entitled to be compensated by the complainant for leading him to take charge of a fund which belonged to a prior lienor and in which there was no equity, *the final decree was reversed for error in excluding evidence of an agreement by Receiver to look solely to the fund* (136 Cal., 646).

The question has since been under consideration by the Supreme Court of Alabama in *Wills Valley Co. vs. Galloway*, 139 Ala., 276, decided in January, 1904. There the receivership order had been reversed upon appeal, and the suit thereafter voluntarily dismissed by the complainants, jurisdiction being reserved to settle the Receiver's accounts. When the accounts came to be settled, the lower Court entered a decree holding the complainants personally liable for the balance due. The Supreme Court unanimously reversed it, saying that such liability is not absolute "without regard to the question whether they are equitably chargeable with it."

The general principles of equity in ruling upon questions of costs are set forth and the leading cases cited at 1 Foster's Fed. Prac. 3d ed. p. 718. Briefly stated, such costs are discretionary, taking into consideration the circumstances of the case and the situation and conduct of the parties. The best illustration for the present purpose, however, are to be found in the various cases bearing upon the disposition of the receiver's costs; the most apposite among which we have just cited.

That the equities are with the appellant is evident from the following facts of record:

First. The authority under which the certificates were issued and the careful provisions made for their payment out of the fund only fully appears.

Second. That the holders regarded the investment as one involving great risk, is confirmed by the fact that the certificates bore interest at 10 per cent., in spite of the high credit of the complainant, upon which no one relied.

Third. It stands admitted that at no time during the receivership or thereafter, until all right either of redemption or of appeal had expired, did any certificate holder, or the receiver, or anybody else, make a claim that the Atlantic Trust Company was responsible. Had such a claim been made, the company could and undoubtedly would have contested the legality of those receiver's certificates (about half of them in all) that were issued for labor and materials and without prior authority from the Court; and would have bid for the property, or redeemed it from the sale, instead of allowing the receiver and his counsel to get hold of it for their own benefit.

Fourth. It appears that the bulk of the certificates were

not regarded at the time as being issued for the benefit of the complainant, but as issued for the benefit of those other persons whom the receiver was bound equally to consider, namely, that portion of the public for whose benefit the canals and ditches and laterals and dams had been constructed and up to that time maintained. In such a case the receiver "is not appointed for the benefit of either of the parties, but of all concerned" (*Davis vs. Gray*, 16 Wall. 203, 218). *Non constat* but had the parties both asked an abandonment of the irrigation service *pendente lite*, the Court might have considered it in the public interest to disregard their wishes. Indeed, probably it would have refused any such request; and the Receiver is the bailiff of the Court, deriving no authority from the parties (24 Am. & Engl. Cycl. of Law, 2d Ed., 26; *Chicago Union Bank vs. Kansas City Bank*, 136 U. S., 223, 236; *Quincy, Missouri and Pacific R. R. Co vs. Humphreys*, 145 U. S., 82, 97; *Texas and St. Louis Ry. Co. vs. Rust*, 17 Fed. Rep., 275, 282; *Central Trust Co. vs. Wabash, St. Louis and Pacific Ry. Co.*, 23 Fed. Rep., 863, 868; *N. Y. P. and O. Ry. Co. vs. N. Y. L. E. and W. Ry. Co.*, 58 Fed. Rep., 268, 278); nor could the company, prior to the receivership, have abandoned the irrigation work without subjecting itself to suit on behalf of the farmers of the vicinage. (See Baldwin on American Railroad Law, 41, 491-2; *Union Pacific R. R. Co. vs. Hall*, 91 U. S., 343, 354.)

FIFTH. The Receiver cannot charge the complainant with amounts borrowed on his own responsibility after consulting only with the farmers of the vicinity, for the purpose of making repairs through an engineer selected neither by the Court, nor by himself, nor by the complainant, but by those very farmers; and the persons accepting such certificates knowing that the Court and the complainant had not been consulted, must conclusively be presumed to have relied entirely upon the result of the repairs for their ultimate reimbursement. As above stated, the Receiver of a corporation with a public interest, is charged with duties partly to the parties and partly to the public. In this case the public interest was so great that the public itself took a hand in it. The farmers of the vicinity who subscribed to the certificates, and made the necessary repairs, did so substantially in the character of special partners.

SIXTH. The act of the receiver in allowing the farmers to nominate the engineer was improper, at least to an extent which estops the receiver from seeking to charge any loss upon the parties to the suit. It was his duty to use his own discretion, guided by that of the Court. He cannot call upon the parties to fulfill his moral obligations when it appears that the persons to whom he improperly delegated his discretion used it unwisely. The delegation is justifiable only on the theory that he was permitting expenditures which were made by volunteers, on the understanding that they would be recovered only in case of success.

SEVENTH. It was the duty of the *receiver*, if there was any reason whatever to anticipate a possible deficit upon the sale, to apprise the Court and parties promptly of the danger; and he is estopped because he did not do so. If on the other hand there was no reason to anticipate such a result, the complainant has done nothing warranting the imposition of costs against it, but the deficit must be attributed to the act of God, in conjunction with the delays caused by the various interventions.

EIGHTH. As late as August, 1896, the receiver clearly gave the Court and parties to understand that the latter had not incurred any responsibility up to that date; and all but $2,500 of the receiver's certificates had been already put out, while those which were thereafter put out were authorized by the form of order previously adopted.

IV. The Receiver is estopped by his own laches from seeking to recover from complainant.

Reference has been made, in the statement of facts, to the action of the Receiver in delaying his present application for more than a year after the confirmation of the sale—after the six months' period for redemption fixed by the final decree (p. 96) had expired—and the time to appeal had likewise elapsed.

The trust company was thus kept in unsuspecting quiet until the time had expired in which it could either bid, redeem or appeal, and then, when there was no longer a possibility of

protecting itself and the bondholders, this inequitable judgment was entered against it.

If there had been a claim that it would be held responsible for this deficit caused by the Receiver's management of the property—following the advice sometimes of the farmers and sometimes of the Court, and acting sometimes apparently on his own responsibility alone—the trust company could have protected itself by bidding at the sale up to the full amount of the deficit. It would have had no more to pay out, even if it became the successful bidder. It would have had, on the other side of its account, the property to exploit or sell. *Non constat* but that the Receiver and his counsel would have bid against the trust company until the whole deficit would have been wiped out. Within the six months after the acceptance of the bid, if this liability had been claimed, the company could have redeemed.

In *Stumpf vs. Hallahan*, 101 App. Div., 383, the Appellate Division of the Supreme Court of New York for the First Department, in defeating an inequitable attempt on the part of a New Jersey mortgagee to enforce payment of a deficiency by suit on the bond in New York, say (O'BRIEN, J.):

> "She [mortgagee] neglected, however, to notify them or make them parties in the foreclosure action, and thus elected to make the land the primary fund, and by selling it, as she did, the defendants lost their rights to protect the security or do what they could to protect themselves against a deficiency. Had they brought suit in New Jersey, *within the six months as provided by statute, the defendants would have had the right to redeem.* Instead, however, of following that remedy, she waited nearly three years before proceeding upon the bond, *and then, the land having gone forever, the defendants were unable to protect themselves and could no longer redeem.*"

Moreover, the reservations in the final clause of the decree confirming the sale might have been appealed from, assuming the Court to have had jurisdiction to make them. The receiver, although he actually filed his petition within the year,

allowed for an appeal, failed to bring it to the notice of the Trust Company until the year had expired. Can any conduct be more inequitable?

The certificate and time check and open account people kept themselves in the background, letting the receiver represent them, and they are charged with the same laches and estoppel. The only difference between them is that the receiver and his counsel went one step further, and bid the property in for themselves under somebody else's name.

There is no particular length of time requisite upon which to found the defense of laches. The rules of equity upon this point have just been summed up by Mr. Justice BROWN in *Patterson vs. Hewitt*, 195 U. S., 309, 317–19:

> "In suits in equity the question is determined by the circumstances of each particular case. * * * The statute frequently works great practical injustice—the doctrine of laches, never. * * * Indeed, in some cases the diligence required is measured by months, rather than by years, [citing cases]. And in others a delay of two, three or four years has been held fatal [citing cases]."

This quotation substantially sustains the definition of laches contained in the Encyclopedia, which has been quoted and approved by the Supreme Courts of Illinois and Alabama (18 Am. & Eng. Ency. of Law, 2d ed., p. 97):

> "Laches is such neglect or omission to assert a right as taken in conjunction with lapse of time more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a Court of Equity."

Among recent cases where delays of one or two years were held sufficient, in addition to those cited by Mr. Justice BROWN, are *Hoyt vs. Latham*, 143 U. S., 553; *New York City vs. Pine*, 185 U. S., 93, 99; *Curtis vs. Lakin*, 94 Fed. Rep., 251; *McMurray vs. Noyes*, 72 N. Y., 523. In the *Pine* case, *supra*, the Supreme Court took the point itself, reversing the Courts below

As stated in *Townsend vs. Vanderwerker*, 160 U. S., 171–186—

> " The question of laches does not depend, as does the statute of limitation, upon the fact that certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstance of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did."

It is not necessary that laches in order to constitute a defense must contain all the elements of a genuine estoppel. 2 Pomeroy's Eq. Jur., Sec. 816, says, as quoted in *Simmons vs. Burlington, etc., Ry. Co.*, 159 U. S., 278, 291—

> " Even when it does not work a true estoppel upon rights of property or of contract, it may operate in analogy to estoppel—may produce a quasi estoppel—upon the rights of remedy."

Moreover, the cases cited are cases where laches was held a defense *to an original bill.* The principle is much more freely applied when it comes up in relation to proceedings in a suit in equity or action at law. Upon interlocutory motions and application, and upon motions and applications after judgment or decree, no subject is more often discussed than the subject whether the applicant's delay has been sufficient to prevent the Court from considering the original merits of the proposition for which he is contending. If the other party has changed his position in any way, has done or omitted to do something which he would not have done or omitted to do had the application been made promptly—if a witness has died, or if the time has expired within which the other party might have taken some proceeding which would have improved his position—the application is very apt to be denied for laches alone.

Except as to this difference, that a much shorter period of delay is sufficient to constitute laches in relation to the making of an interlocutory application, or of an application after judgment, the test is the same as that which is applied when the

defense of laches is raised by demurrer, plea or answer to the original bill.

To the above citation of authorities and that made by Mr. Justice BROWN, we may also add the cases of *Galliher vs. Cadwell*, 145 U. S., 368, 372; *Abraham vs. Ordway*, 158 U. S., 416; *Matter of Lord*, 78 N. Y., 109.

Our contention here is that there was justification for the failure of the Trust Company to foresee the possible dangers of the receivership; and that since the complainant, the certificate holders, and all other parties (including, as on the presumption of fair conduct we ought perhaps to include, the receiver himself), likewise acted on the assumption that there was no personal liability, it would be grossly inequitable, even if the power existed, to charge costs now upon a theory which formed no part of the implied contract under which the expenses were run up.

V. In all cases where a complainant has been charged personally with the expenses of a receivership, he was held to be in some way in the wrong.

In the case at bar, the complainant has succeeded in his suit, the judgment was entirely in his favor, the appointment of the Receiver was in all respects regular, the *res* was in Court for distribution, all allegations of bad faith are controverted and disproved, there was no express contract or promise to pay the Receiver's expenses and none can be implied from the nature of the Receiver's appointment.

Under these circumstances we submit that there is no principle on which the complainant can without its consent be made liable to the Receiver.

The Atlantic Trust Company can not be regarded as negligent in assuming unquestioningly that it had no personal responsibility, in view of the fact that there had been no prior application of this kind, while so many cases had proceeded upon theories apparently inconsistent with such a ruling; and as to the Receiver's certificates in particular, in view of

the cases and text books which had held that they were only a lien upon the fund and without personal responsibility beyond them (*Turner vs. Peoria & Springfield R. R. Co.*, 95 Ill., 134, 145-6 ; *McCurdy vs. Bowes*, 88 Ind., 583, 584-5 ; *Burt vs. Bull*, L. R., 1895, 1 Q. B., 276, 279-80, 282, 284 ; Beach on Receivers, Sec. 416 ; Smith on Receivers, Sec. 287 ; High on Receivers, Sec. 398 *c & e ;* Kerr on Receivers [Lon. ed., 1900], p. 195, 208 ; 24 Am. & Eng. Cycl. of Law, 41 ; Judge CALDWELL on " Railroad Receiverships in the Federal Courts," 30 Am. L. Rev., 162). It is for this very reason that they are held non-negotiable (*Union Trust Co. vs. Chicago & Lake Huron Ry. Co.*, 7 Fed. Rep., 513, and cases cited).

The mere fact that the trust deed (p. 54, Article sixth), gave the trustee the right to take possession of the property in case of default and to sell it at public auction did not make it obligatory on it to do so. Article eighth (p. 56) provided :

> " Nothing herein shall be construed as limiting the right of the Trustee to apply to any competent Court for a decree of foreclosure and sale under this indenture, *or for the usual relief in such proceedings ; and the said Trustee, or its successor, may in its discretion, so proceed.*"

Some importance seems to have been attached by the Court below to this discretion, for Judge GILBERT refers to it in his opinion (Record, p. 170), in these words :

> " It brought the foreclosure suit at the request of stockholders [bondholders], it is true, but it was not bound to resort to the Court or to ask for the appointment of a receiver. The trust deed gave it the option to sell at public auction the entire property in case of default in the payment of interest."

In the light of subsequent experience it might possibly have been better for the trustee to have exercised its option to sell, but at the time when the application for a Receiver was made

> " matters were almost in condition of a riot ; the most intense feeling was existing on the part of a large num-

> ber of people against the management; threats of all kinds were made against the corporate defendant and against the property under its charge, and which came into my charge as receiver. * * * Very frequently when I have visited the works I have been met by angry and excited crowds threatening my own life and threatening to blow up the dam with dynamite and destroy the works."
>
> Receiver's Report of Aug. 10, 1897, p. 79.

If the Receiver, under the protection of the Court, encountered such obstacles, what would have been the result if the non resident trustee itself had attempted to take possession of the property? It was only the long arm of the Court which could protect the property under such conditions, and the resort to equitable powers of that Court was not only a proper exercise of the trustee's discretion, but was absolutely necessary to conserve what was then deemed by every one to be a valuable property, and upon which had been expended the large sum of $175,787.15 (see Trial Balance, Exhibit A, pp. 28–30).

Furthermore, the floating indebtedness was so large that the property would inevitably have been attached and disrupted.

No clearer case was ever presented for the appointment of a Receiver, and the good faith of the trustee in making the application cannot be questioned.

Examination of the authorities cited by the learned Circuit Court of Appeals in its first opinion (119 Fed. Rep., 257) show that none of them are in point. So far as they approach the subject at all, they may be divided into three classes (we add some also which were not cited by it): first, those which hold that when the *order appointing the receiver is illegal* and was improperly obtained by the plaintiff, it would be inequitable to charge the expense upon the property, and, therefore, it must be charged to the plaintiff, a familiar rule of obvious correctness (*Pittsfield Nat. Bank vs. Bayne*, 140 N. Y., 321, 330–1, per PECKHAM, J.; *French vs. Gifford*, 31 Iowa, 428; *McAurow vs. Martin*, 183 Ill., 467; *Link Belt Co. vs. Hughes*, 195 Ill., 413; *Beach vs. Macon*

Grocery Co., 11 Am. Bank. R., 104; *Couper vs. Shirley*, 75 Fed. Rep., 168); second, those which hold that when the receivership order was legal, but the plaintiff is finally defeated in the suit, the chancellor has power to charge the receivership expenses upon him as *part of the costs* (*Highley vs. Deane*, 168 Ill., 266; *City of St. Louis vs. St. Louis Gas Light Co.*, 87 Mo., 223; *Cutter vs. Pollock*, 7 N. Dak., 631), although this power can be exercised only when the plaintiff's action in commencing suit and obtaining a receiver involved an impropriety (*Ferguson vs. Dent*, 46 Fed. Rep., 88, 96–8; *Elk Fork Oil Co. vs. Foster*, 99 Fed. Rep., 495); and third, when there was no fund at all for the Receiver to take, so that his acts in taking possession of the property were in derogation of the rights of the lawful owner, whose rights could and should have been respected by the plaintiff. This last exception has had two different applications: first, to the case of a receivership in a suit against A, the property turning out to belong to B, who had no interest in the controversy (*Howe vs. Jones*, 66 Iowa, 156); and second, when the receivership is of an equity of redemption, the property is not sufficient to take care of the prior mortgage, and the plaintiff has failed to obtain the consent of the mortgagee to the receivership (*Tome vs. King*, 64 Md., 166; *Ephraim vs. Pacific Bank*, 129 Cal., 589; *Knickerbocker vs. McKindley Coal Co.*, 67 Ill. App., 291), and even then, if the equities favor the complainant, it will alter the rule (*Ephraim Case* [2d appeal], 136 Cal., 646; *Wills Valley Co. vs. Galloway*, 139 Ala., 276).

The authorities are well summed up in Mr. Peckham's brief, to which we have before referred and from which we again quote:

> "It is clear in this case that there is no express contract by the complainant to pay this receiver.
>
> "How can a contract or promise to pay be implied when the sole duty and obligation of the receiver are to take care of the property for the benefit of the complainant or others entitled, and when to encumber it even at all would be a breach of trust unless pursuant to an order of the Court?

"It is, however, suggested that there are many cases holding the parties liable to the receiver.

"We agree.

"In a certain way it may be said that all parties are liable to the receiver.

"A defendant who fails always has to pay the receiver; because the receiver's compensation is taken out of the property and the balance only applied to the payment of the debt, and the surplus is less or the deficiency greater.

"A complainant who has failed to establish his claim to the *res*, whether because of matter in abatement or in bar, may be liable to the defendant for the receiver's fees which the defendant has had to pay to the receiver in possession in order to get back his property.

"He *may* even be liable directly to the receiver if the judgment be that the plaintiff had no right in the *res* and it has been taken from the receiver by one having paramount right and from whom the receiver had no right to retain the property for compensation or fees.

"*Pittsfield Bank vs. Bayne*, 140 N. Y., 321, and *Howe vs. Jones*, 66 Iowa, 156, are illustrations.

"These and similar cases are but the reverse of the liability of defendant in that payment of the costs of receivership diminishes the amount of surplus or increases the amount of the deficiency for which the debtor is liable.

"In these cases judgment was rendered *against* the plaintiff. It was adjudged that the plaintiff had no lien on or interest in the property which plaintiff had caused to be seized, and that as the seizure was wrongful and the receiver could not deduct his fees before turning over the property, the plaintiff might be liable to pay them *because the plaintiff had failed in his suit.*"

VI. The Circuit Court had no jurisdiction, after the final decree of foreclosure and sale, to make any new disposition of the costs of the suit, as by charging any portion personally upon the complainant.

It would of course have been within the power of the Court, in settling the terms of the final decree of foreclosure and sale, to reserve any or all questions not absolutely necessary to be adjudicated before the sale. This is often done. A familiar form is to be found in *Chamberlin vs. Peoria, D. & E. Ry. Co.*, 118 Fed. Rep., 32, 34, where the decree ended as follows :

> " All equities and rights of any parties not hereinbefore specifically adjudged, including the discharge of the receiver and the passing of his accounts, and all other questions of every kind and nature not hereby disposed of, are hereby reserved for future adjudication, the settlement of the same being held not to be necessary for the purpose of this decree, and the Court reserves the right to make such further order at the foot of this decree as may seem just and proper, and jurisdiction in this Court is retained by this Court for the purpose of enforcing all the provisions of this decree."

Notwithstanding these very broad provisions, so different from those in the present case, the Court evidently regarded as *frivolous a contention that any jurisdiction not expressly reserved could survive ;* and therefore held that it had no jurisdiction to certify to the Supreme Court a question of jurisdiction after the expiration of the term at which the decree was rendered.

Much stress was laid by the Court of Appeals on the first appeal (119 Federal, 257, 267) that the Circuit Court had " by its decree in express terms *retained jurisdiction of the cause and of the parties* thereto for the purpose of settling the receiver's account and ordering paid the costs and expenses of the receivership."

That reservation was contained only in the order confirming the sale (p. 112) and not in the final decree.

In the final decree no reservation was made except a power to modify as to the upset or minimum price at the bidding, as to the manner of sale of the personal property and as to the withdrawal of certain personal property from the sale for purposes of compromise (p. 107). The subject of costs is one which is customarily and properly disposed of by the final decree of foreclosure and sale. The Circuit Court in the present case, upon motion of the solicitors for the Atlantic Trust Company, followed this practice, and left no provision as to costs undisposed of. It fixed the compensation of the counsel for the various parties and of the Receiver. It fixed the Receiver's fees. It provided how all of these sums should be paid, namely, "out of the proceeds of the sale hereinafter ordered" (p. 90). It fixed the compensation which the Commissioner should receive for making the sale (p. 96). It charged certain costs personally upon certain intervenors, and provided how they should be taxed and how they should be collected (p. 107).

We submit that the decree of foreclosure and sale is the final decree in the cause. In fact, the confirmation of a foreclosure sale is very commonly effected by an order instead of a decree, and it is not seldom omitted altogether.

The cases which established the appealability of rulings made upon confirmation of a sale were made upon appeals from orders, not from decrees (*Blossom vs. Milwaukee, &c., R. R. Co.*, 1 Wall., 655; *Orchard vs. Hughes. Id.*, 657). Probably the most usual practice in the United States Courts would be to entitle such a ruling as an order, rather than as a decree. The finality of the decree of foreclosure and sale was first established in *Ray vs. Law*, 3 Cranch, 179, upon motion to dismiss an appeal therefrom. In *Whiting vs. Bank of the United States*, 13 Pet., 6, the filing of a bill of review brought the question up in another form. If the decree of foreclosure was the final decree the bill was too late, having been filed more than five years thereafter. The Court so held. STORY, J., saying as to the objection (p. 15):

> "That depends upon this; whether the decree of foreclosure and sale is to be considered as *the final decree* in the sense of a court of equity, and the pro-

> ceedings on that decree *a mere mode of enforcing* the rights of the creditor, and for the benefit of the debtor; or whether the decree is to be deemed final only after the return and confirmation of the sale by a decretal order of the Court. We are of opinion, that the former is the true view of the matter. * * * Indeed, the ulterior proceedings are *but a mode of executing the original decree*, like the award of an execution at law."

In *Forgay vs. Conrad*, 6 How., 201, 203-4, this opinion is referred to by Chief Justice TANEY as showing "that the decree of foreclosure and sale was final upon the merits, and the ulterior proceedings but a mode of executing the original decree."

A decree is final which settles all the rights of the parties and leaves nothing to be done but to make the sale and pay out the proceeds.

> *Grant vs. Phœnix Ins. Co.*, 106 U. S., 429, 431.
> *R. R. Co. vs. Express Co.*, 108 U. S., 24.
> *M., K. & T. Ry. Co. vs. Dinsmore*, 108 U. S., 30.

It will be noticed that this classification fails to include the subject of costs. These are not strictly part of the "merits," nor on the other hand do they relate to the enforcement. We believe it to be a universal rule, however, to dispose of the costs in the final decree of foreclosure and sale as was done by the Court in the present case; and if the subject is taken up and disposed of, and no right to modification reserved, it cannot be regarded as a proper incident thereafter to a mere enforcing order. It is submitted that every party to a final decree of foreclosure and sale has an absolute right to absent himself altogether from all future proceedings, with a sense of security as against any claims not already adjudicated, *excepting only if he be served with notice of an application to open or review that decree.*

The decree of confirmation of sale in this cause in its very first line refers to the "*final* decree of foreclosure and sale" (p. 108). There is no recital that the complainant appeared. There was no reason why it should appear in the absence of any notice of claim against itself. Nobody but the Receiver was interested in having his title to the property confirmed.

The settlement of the Receiver's final account and his discharge were routine matters, purely incidental to the final judgment, in which the complainant has no interest, in view of the result of the sale. There were really no accounts to settle—as the clerk had made complete distribution of the fund (p. 113). The Receiver's discharge would be granted as a matter of course. To remand the case to the Circuit Court for that purpose would be an idle formality. There was but one real controversy before the Court, and that was the simple question as to whether the Court had power, after final judgment, to enter judgment against the complainant in the original cause. The Circuit Court of Appeals held that such power existed. Judge Monnow and the Supreme Court of Oregon held that no such power existed.

The decision of this Court is awaited with grave interest by all corporations and individuals whose business it is to act as mortgage trustees for bondholders. It will affect numbers of foreclosure suits pending in many courts throughout the country. The complainants in the more important cases are usually trust companies possessed of large means and high credit. If the Circuit Court of Appeals has, as we believe, misinterpreted the law, these trustees should be advised of it by the adjudication of this Court, and relieved of an almost limitless liability, because of the mere appointment of a Receiver over whose actions they have no control.

It is respectfully submitted that upon the view of the law heretofore held by everybody and questioned by nobody, immense numbers of business transactions, great and small, have been based. Receivers have had to pay high prices because they could give no security except that of the fund in court. For the same reason their certificates have carried very high interest, or been sold at great discount, or both. If these trust companies are now held to have been responsible for any deficiency, it will mean that, by a universal mistake of the law, properties in the hands of the Courts have been unnecessarily depleted, and it will mean that persons who have exacted high interest and large discounts from Receivers, because it was supposed by both the Receivers and themselves that there was no personal liability, may have it in their power to now obtain unexpected profits by collection of their claims out of

the unfortunate plaintiffs. Had it not been regarded as established law that there was no personal responsibility on any party's part for the expenses of a receivership, many great properties would have been at once sacrificed, which, by means of Receivers' certificates, sold at a discount, have been carried through hard times and put on a sound basis again under direction of the Courts.

VII. The judgment of the Circuit Court should be reversed.

October, 1907.

STANLEY W. DEXTER,
EDWARD B. WHITNEY,
Of Counsel for Atlantic Trust Company,
Petitioner.

FILED
OCT 6
JAMES H. [illegible]

No. 109.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

THE ATLANTIC TRUST COMPANY,
Petitioner,

vs.

EDGAR C. CHAPMAN, Receiver of the Woodbridge Canal and Irrigation Company, et al.,
Respondent.

REPLY OF RESPONDENT CHAPMAN IN PERSON TO PETITION FOR WRIT OF CERTIORARI.

EDGAR C. CHAPMAN,
Room 16, Ferry Building, San Francisco, Cal.
Respondent in Person.

Fernau Publishing Co.

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REPLY OF RESPONDENT CHAPMAN IN PERSON TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

This Court is asked to review the proceedings of the U. S. Circuit Court of Appeals, 9th Circuit, wherein the order of the Circuit Court was affirmed adjudging the receiver of the Woodbridge Canal and Irrigation Co. entitled to be paid the expenses

incurred in the management of the property of the Canal Company while *in custodia legis.*

The order above referred to was made after the entry of the decree of foreclosure and sale, and an order of confirmation of sale, in a certain foreclosure proceeding hereinafter set forth; the Court reserving jurisdiction in and by said last named order to provide for the payment of such expenses.

Nearly twelve years ago the Atlantic Trust Company of New York commenced a foreclosure suit in the United States Circuit Court in and for the Northern District of California. The defendant was the Woodbridge Canal & Irrigation Company, a California corporation, organized and doing business under the laws of that State.

DEED OF TRUST.

The instrument sued on was a deed of trust, by the terms of which, among other things, it was provided, "that in case of default in the payment of the "semi-annual interest on the bonds of the Canal "Company for a space of six months, the Trust "Company was expressly authorized to sell the "entire property of the Company on two months' "notice, by advertising in one or more newspapers "of general circulation" (Printed Record, 28 and 106).

It was also provided "that nothing herein shall be "construed as limiting the right of the Trustee "(Atlantic Trust Company) to apply to any com-

"petent court for a decree of foreclosure and sale "under this indenture" (Printed Rec. 30). It was further provided, "that in case it shall be re- "quired by the holders of bonds secured by this "indenture to enforce any of their rights hereby "secured, the said trustee shall not be required to "incur any expense or liability in connection there- "with until satisfactorily indemnified therefor" (Printed Rec., 31).

ORDER APPOINTING RECEIVER.

On motion of the Trust Company, to which the defendant consented, a receiver was appointed by the Court at the time of commencing said suit, whose duty it was, under the order appointing him, "to "continue the operation of the main and branch "canals of the said Woodbridge Canal & Irrigation "Company in the usual and ordinary course, as the "same is now operated, * * * keeping the "premises and property, both real and personal, in "good condition and repair, * * * and pay for "all such needful labor and supplies and materials "as may seem to him to be necessary and proper "in the exercise of his sound discretion, for the "carrying on and keeping in repair said canals, "with leave to apply to the Court from time to time "as he may be advised for instructions in the prem- "ises" (Printed Rec., 39).

COMPLIANCE OF RECEIVER WITH ORDERS OF COURT.

The receiver complied with the order of his appointment in all respects. He reported to the Court from time to time concerning every step connected with the operation, maintenance and repair of the canal. He informed the Court and all parties in interest of the necessity of raising money if the order of his appointment was to be carried out. This resulted in orders of Court authorizing him to borrow money and issue certificates therefor (Printed Record, 70-73).

No objection was made to the manner of the receiver's management in any respect by the parties to the suit or by anyone; not a word was said about the impropriety, now enlarged upon by the petitioner herein (see petition, page 5), of the farmers nominating the old engineer of the Company, W. C. Pidge, to take charge of repairing the dam of the Company and the receiver's appointment of him until years after the foreclosure and sale of the property; and not until the receiver filed his petition for the order, asking the Court to compel the Trust Company to provide for the expenses of the receivership now unpaid and outstanding.

ATTITUDE OF TRUST COMPANY TOWARD THE COURT.

The Trust Company had notice of all of the proceedings connected with the receiver's management, and acquiesced therein. (Reports of Receiver, Printed Record, 42, 69, 143, 225.)

The appointment of the receiver was made during the financial panic that commenced in " '93", and swept the United States; and hence it was impossible to raise money or to dispose of receiver's certificates issued by the Court's order to any banking institution or money lender in the State of California or elsewhere (Printed Rec., 70-73).

DERELICTION OF TRUST COMPANY.

The Trust Company was aware of the efforts made by the receiver to raise money on receiver certificates, yet it made no effort to assist him in any way. It could have done so. It had come into court asking to have a large deed of trust foreclosed and to have its solicitors paid $10,000 for their services in that behalf, and had thereby impliedly represented to the Court that the property of the Canal Company was of great value (Printed Rec., 90), and yet it would not volunteer to advance one cent of costs, although at that time and ever since, as appears by the answer, it has been a "*corporation enjoying very "high credit in the commercial community of the "United States*" (Printed Rec., 280).

These facts, taken in connection with the proposition that, at the time of the foreclosure sale, the Trust Company made no effort to prevent a sacrifice of the property, furnish the reasons why the Company should pay the balance of the Court's expenses —especially so, as there was no necessity of asking the Court to assume the care and management of

the property under section 6 of the deed of trust—said section providing for a sale of the property at public auction on 60 days' notice by publication in one or more newspapers (Printed Record, 105).

Therefore, unless the Trust Company intended to deliberately impose upon the Court, it was its duty to move to terminate the receivership or else agree to provide for the payment of the expenses thereof during the progress of the litigation or at the end thereof. The Court could not determine in advance what the Trust Company might do at the foreclosure sale. If the property were of great value, the Court might naturally conclude that the Trust Company would finally come to the rescue and save the property from being sacrificed, it having the ability so to do; and thus aid the Court which had pledged its faith to the payment of the expenses of managing the property brought into it by the complainant. And it here may be proper to refer to the opinion of Judge Ross in Chapman v. Atlantic Trust Company, when the sufficiency of the receiver's petition was being tested on demurrer:

> "the complainant can inform himself of the probable outcome of the property, and, if he be not willing to give the guaranty he will not secure the appointment of a receiver in the one instance, or his continuance in office in the other. But why should he not be required to inform himself, also, when no such condition is imposed by the Court? Precisely the same opportunity on complainant's part, and precisely the same duty to inform himself in that respect, exists in the absence of the requirement of the

guaranty mentioned. The complainant, whose lien upon the property it is sought to foreclose, in the nature of things, must and should be held to have much better information regarding the value of the property and its probable outcome than the Court. Indeed, it is not easy to see how the Court can be properly expected to know anything about it. The appointment of a receiver, if made at all, is usually made at the request of the complainant,—occasionally, as in the case at bar, with the consent of the defendant. *If the complainant was not willing to pay the expenses of the receivership it asked for, in the event of the insufficiency of the property to do so, it should not have asked the Court to make the appointment, incur the liabilities, and pledge its faith to their payment.* It was the duty of the complainant to keep informed in respect to the progress of the receivership, the property, and its probable outcome, and, whenever it became unwilling to further stand good for any deficiency, to ask the Court to bring to an end the business it undertook and was conducting on complainant's petition. We are therefore of the opinion that *the complainant is liable for the deficiency shown by the decrees already rendered in the cause, and for such further deficiency as may be properly ascertained;* and such is the decided weight of authority". (119 Fed. Reporter, page 269.)

The conduct of the Company is attempted to be explained by its counsel. They say that the Trust Company had no idea that it was liable for the payment of the Court's expenses. It assumed the law to be that the Court had no power to protect itself in the event it had been misled at the instance of complainant as to the value of the property brought

by it into court to be operated, managed and administered.

That we are not mistaken as to the attitude of the Trust Company in this behalf appears from the eleventh paragraph of the Company's answer, in which the following is set forth, "and this com-" plainant further shows that it is a corporation " enjoying *very high credit in the commercial com-" munity of the United States, and that, had it been " stated or believed by the persons taking said re-" ceiver certificates or any of them, that this com-" plainant was personally liable upon them, either " primarily or secondarily, they would have been " rapidly subscribed to at a low rate of interest in-" stead of being put out with great difficulty at an " interest of 10% per annum*". (Printed Record, 280.)

This reasoning does not commend itself to us, for it is an admission of a violation of duty on its part to the Court. Especially so as it appears by the terms of the deed of trust and the averments of its answer that the Trust Company could have been fully indemnified for all the expenses incurred by it in these proceedings (Printed Rec., 31 and 109).

THE PETITION FOR THE WRIT OF CERTIORARI SHOULD BE DENIED

Having set forth the situation and relation of the Trust Company to the Court and its receiver, we come now to the consideration of the Trust Com-

pany's application to this Court for a writ of certiorari.

We contend that the writ should not be given for the following reasons:

1st. THIS COURT IS WITHOUT JURISDICTION TO GRANT THE RELIEF ASKED FOR.

By the act of Congress of March 3, 1891, it is, among other things, provided

> "That Circuit Courts of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error the final decision in District Courts and in the existing Circuit Courts in all cases than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the Circuit Court of Appeals *shall be final* in all cases in which the *jurisdiction is dependent entirely* upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States." (26 U. S. Stats. 828, 826, Sec. 6.)

See also Rouse v. Letcher, 156 U. S. 47; Gregory v. Van Ee, 160 U. S. 643; Carey v. Railway Co., 161 U. S. 115; Rouse v. Hornsby, 161 U. S. 590.

The Circuit Court had jurisdiction over the subject matter contained in the bill of complaint and all the parties thereto, and, having pleaded in its bill of complaint the fact of diverse citizenship of the parties to the litigation, upon which the jurisdiction of the Circuit was made solely to depend, we

hold that the determination of the appeal to the Circuit Court of Appeals should end the litigation.

It is a familiar rule of equity that jurisdiction once acquired is retained by the Court until justice shall be meted out to all parties. Therefore, the decision of the Circuit Court of Appeals in affirming the judgment of the Circuit Court was, and is, under the act of Congress *final* and no appeal therefrom or writ of certiorari lies to this Court.

The claim of counsel that the jurisdiction which it admits the Circuit Court had, to enter the decree of foreclosure and sale, was lost by it because the decree contained no provision for any possible deficiency, is untenable; for, obviously the Court had the undoubted right to confirm the sale *after the entry of the decree of foreclosure or reject it, or to impose conditions as to the expenses that had been incurred by the Court up to that time; and this implies the retention of jurisdiction.* That this is so, is evident from the fact that until the sale was actually made the Court could not know that there would be a deficiency. The Court is not bound to provide for something that may never occur,—"sufficient unto the day is the evil thereof".

Jurisdiction to enter a decree confirming the sale having been by necessary implication retained, it follows that the Court, then being in possession of additional knowledge, had the right to, and it did expressly retain, jurisdiction of the case in the following language: "and it is further ordered that

" jurisdiction of this cause and the parties thereto " be and the same is hereby retained by the court " until redemption is made or title deeds have " passed as herein provided, and until the coming " in of the reports of the said clerk and receiver " herein provided for, and to the final action of the " court thereon, and the final payment of the balance " of the costs and expenses of this court and its " officers, and of the advances made and the indebt- " edness incurred by said reciver which have been " or may be allowed by the court, in the management " and care of the property placed in his charge and " until the further and final order of the court in " that behalf". (Printed Record, 222.)

The Trust Company is, therefore, concluded by the decision of the Circuit Court of Appeals from proceeding further in this matter, for the decision of said Court was, and is, final.

2nd. THE TRUST COMPANY IS ALSO CONCLUDED BY THE DENIAL OF ITS FORMER PETITION FOR A WRIT OF CERTIORARI FILED HEREIN.

Upon the former hearing before this Court it was argued that the Circuit Court did not have jurisdiction to grant the relief demanded by the receiver,—that the order of the Circuit Court entertaining the report of the receiver was not an appealable order because made after final judgment. The receiver argued that, as he was not affected by it, he could not appeal therefrom—that only the parties to that proceeding were affected by it.

The same proposition and none other is again presented to this Court. The action of this Court in denying the former petition of the Trust Company is res adjudicata. (Cyclopedia of Law & Procedure, vol. 6, p. 747.)

Counsel claims that the case now brought here by the Trust Company is different. This is not so. True, the answer of the Trust Company was not before the Court on the former hearing, but, as it does not deny any of the material facts of the receiver's petition, it admits all the averments of the receiver's petition that are well pleaded and that are material (Printed Record, 255). See also recent decision of Circuit Court of Appeals in Atlantic Trust Company v. Chapman in the Printed Record.

The Circuit Court entered a decree against the Trust Company under stipulation of counsel as upon Bill and answer. The Receiver filed no replication. It was not necessary to do so. The answer raised no issue. The *expenses of the receivership set forth in the petition were all admitted by the answer* The answer raised no issue as to the amount, nature, or character of such expenses, nor that they were not legally incurred. It merely denied legal liability on the ground of want of jurisdiction of the Circuit Court to entertain the petition of the Receiver in that behalf. The *demurrer theretofore filed by the Trust Company had likewise denied legal liability on the same* grounds as are set forth in the Trust Company's answer but its contention in that behalf

was not sustained either by the Circuit Court of Appeals; or by this Court, on the former application of the Trust Company for a writ of certiorari.

This Court having heretofore considered the question of the right of the Circuit Court to enter a decree in accordance with the Receiver's petition and having resolved that question in favor of the Receiver and against the Trust Company it follows that this Court will not now reconsider the same,—in other words *this Court having concluded that the action of the Circuit Court of Appeals was final* under the Act of March 3, 1891, will not entertain the petition now before it for a writ of certiorari.

ARGUMENT OF COUNSEL.

The argument of Counsel for the Trust Company seems to be an attempt to convince this Court that the Circuit Court decided the case incorrectly on the merits. That is not a proper subject for discussion here. The question here is one of law—the *right of the Circuit Court to grant the petition of the Receiver,* it having expressly retained jurisdiction of the case for that purpose.

While we do not think it proper to discuss the merits of the decree of the Circuit Court we will say in passing that there is nothing in the record to disclose any objection to any of the acts of the Receiver made at the time of their occurrence but all of his expenses are admitted to have been properly made;

the answer of the Trust Company avering that "all "of said items were adjudicated by this Court in "the final decree of foreclosure entered herein" (Printed Rec. 260).

COUNSEL'S FIVE POINTS.

We have examined the five points of counsel's argument contained in the petition, but as they do not show that the Circuit Court was without jurisdiction to entertain the petition of the Receiver we do no deem it advisable to consider them at length.

First: The Trust Company's first point is "*that the conflict in opinion between the high appellate tribunals which have passed upon the above question makes it one eminently proper to be considered by this Court*" to which we reply that this Court will not issue the writ asked for and assume jurisdiction herein contrary to the Act of Congress merely because there may be a conflict of authority between two State Courts on one side, and the Circuit Court of Appeals on the other. It may be desirable to have uniformity of decisions between all of the courts of the land, but this Court would not be justified for that reason to nullify Section 6 of the Act of Mar. 3, 1891.

Second: "*The question is one of very great importance.*" As to the practical importance of this question we have only to say that the Congress of the United States has delegated to the Circuit

Court of Appeals exclusive power to decide such questions as are involved in cases of this character and in our opinion such courts are thoroughly competent to exercise it. If the Act of Congress is wrong in that respect it should be repealed, but while it is the law, this Court will not ignore it.

Third: "*The decision of the Circuit Court of Appeals in this case is inconsistent with the settled and fundamental laws of receiverships.*" To which we reply, the Supreme Court of Oregon says that the precise question has never been presented before of the right of a *railroad receiver* to be compensated (?) under such circumstances. The Court could find no decision in point on the subject; therefore, the settled and fundamental principles of the law of receivership ought not to be very badly shaken by the decision of the Circuit Court of Appeals even though it differed with the Oregon Court. The Circuit Court of Appeals was, of the opinion however, that there was a decided weight of authority in favor of the Receiver's contention, and that the reasoning of the Supreme Court of Oregon was not sound, and held that the *Circuit Court having pledged its faith* to the payment of expenses incurred by it in the management of the property placed in its charge, had the power to enter a decree (compelling reimbursement by complainant) *after the entry of the entry of the decree of foreclosure.* (Chapman v. Atlantic Trust Co., 119 Fed. Rep. 269.)

We have answered points Four and Five.

Having shown that the Circuit Court acquired jurisdiction of the parties to the foreclosure suit above referred to, and having shown that the jurisdiction so acquired was not lost upon the entry of the decree of foreclosure and sale nor until an appeal was taken from the order adjudging that the Receiver's petition be granted, and having shown that the *Circuit Court of Appeals had under the Act of March 3, 1891, absolute and final authority to affirm the decree of said Circuit Court,* and having shown that the same proposition and none other was disposed of by this Court upon the former application of petitioner it follows that the present petition of the Trust Company for the writ of certiorari asked for should be denied.

Respectfully submitted,

EDGAR C. CHAPMAN,
Room 10, Ferry Building, San Francisco, Cal.
Respondent in Person.

Office Supreme Court, U. S.
FILED
DEC 13 1907
JAMES H. McKENNEY,

No. 109

In the Supreme Court

OF THE

United States

OCTOBER TERM 1907.

THE ATLANTIC TRUST COMPANY,
Petitioner,

vs.

EDGAR C. CHAPMAN, Receiver of the Woodbridge Canal and Irrigation Company et al.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Brief for Respondent Edgar C. Chapman, Receiver, Etc.

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PEIRAU PUBLISHING CO., S. F.

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A complainant having the option under a trust deed to sell at public auction, brings a foreclosure suit against an irrigation company (Record, p. 15).

A receiver is appointed upon the application of complainant (pp. 7 and 20).

The defendant defaults (p. 86). The receiver manages and operates the property for a period of three years before complainant applies for a decree of foreclosure and sale (p. 86).

He complies with all of the orders of the Court appointing him.

Reports to the Court from time to time concerning the condition of the property and its operation (pp. 22, 32, 73, 114).

Struggles with all the resources at his command to keep the property a "going concern" (pp. 32, 33, 36, 37, 38, 39).

The income derived from the property is insufficient to meet expenses (pp. 32, 33).

The receiver seeks financial assistance from the Court upon notice to complainant (pp. 32, 33, 34).

Is given permission to borrow money on receiver's certificates (pp. 34, 39).

Has great difficulty in floating them (pp. 74, 75).

He accounts fully to the Court and to the parties concerning all of his receipts and disbursements (pp. 77, 116).

His accounts are conceded to be correct pp. 131, 148).

He receives no assistance of any kind from complainant, either at the commencement of the suit, or at any time during the progress thereof, though complainant is

at all times abundantly able to supply all needful funds, being a corporation *enjoying very high credit throughout the United States* (p. 142).

The receiver seeks to terminate the receivership by filing a petition to have the property sold (pp. 35, 39).

The Court takes no action in the premises for more than a year thereafter, during which time expenses and costs are accumulating through no fault of the receiver.

The property is finally sold by the Court, the judge thereof conducting the sale (pp. 108, 109, 110).

The complainant is represented at the sale by its solicitors (p. 108).

No bid is offered on behalf of complainant (pp. 108-112).

The proceeds of sale are insufficient to meet the expenses of the receivership by $36,207.57 (pp.113, 149).

May the receiver look to the party at whose instance he was appointed, for the payment of this deficiency, or, is he limited to the proceeds of the property?

Upon whom must this great loss fall? Upon the *Court* or upon *complainant?*

THE PETITIONER'S CONTENTION.

In the Court below, petitioner, The Atlantic Trust Company contended, and contends here that the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California, did not have the power

to go beyond the decree of foreclosure and sale, and compel complainant to make up the deficiency; and, that if the Court did have the inherent power so to do, it could not in this case, because prevented by its decree of foreclosure and sale, which was *final* not only as to the parties, but the receiver as well; and because the equities were in favor of appellant; and because of the laches of the receiver.

All of these questions were first presented to the United States Circuit Court in which the foreclosure suit was instituted, by the filing of the demurrer of complainant therein, to the receiver's final report and petition, asking that his supplemental accounts be approved, and that complainant be ordered to show cause why the deficiency shown by the record of the foreclosure proceedings should not be paid.

Complainant's demurrer being sustained, and the order to show cause discharged, the receiver appealed to the United States Circuit Court of Appeals for the Ninth Circuit.

> Chapman v. Atlantic Trust Company, 119 Fed. 257-270.

There all these questions were exhaustively treated in the opinion of the Court written by Judge Ross, wherein the positions taken by the receiver were each severally sustained.

After the Circuit Court of Appeals had thus determined that the petition of the receiver stated facts sufficient to entitle him to the relief sought for, the case

was remanded to the Circuit Court for further proceedings and then the case was submitted by consent of counsel upon *bill and answer;* and no replication on the part of the receiver was filed (p. 147).

After certain admissions of counsel had been made, the receiver and his counsel waiving any further claim to personal compensation or fees since the rendition of the decree of foreclosure and sale, and the solicitors of complainant admitting the correctness of the receiver's supplemental account, the Court rendered a deficiency judgment against complainant for the full amount of the expenses of the receivership then remaining unpaid (p. 148).

From this judgment complainant The Atlantic Trust Company appealed to the Circuit Court of Appeals. The judgment of the Circuit Court was affirmed and this Court is asked to review the record.

Atlantic Trust Co. v. Chapman et al., 145 Fed. 820-823.

SUBMISSION ON BILL AND ANSWER.

No replication was filed by the receiver to the answer of complainant. It was not necessary so to do (p. 147). (See order of submission 146, 147).

The petition of the receiver for the most part consisted of a statement of facts taken from the record which had been admitted to be correct (pp. 129-144).

The only additional facts pleaded in the petition aside from those of collusion between the parties related to

the supplemental proceedings concerning expenditures, which were by admissions made in open Court also conceded to be correct (p. 148).

The petition of the receiver sets forth the *deficiency shown by the record and the answer admits that this deficiency exists* (pp. 115, 131).

The petition relies upon the record for its facts and so must the answer.

In fact the answer is an elaborate recital of the facts contained in the record and also an argument based on such recital to the effect that it is not legally liable for the deficiency (p. 131).

True, in some instances the answer after adopting parts of the record, pleads facts inconsistent therewith, as where the expenses of the receivership are chargeable to the property only (p. 132); but we apprehend that such denials raise no issue, and that this Court will consider as true only those denials of the answer as do not impeach the record.

Concerning the sufficiency of the answer to deny any of the material facts of the petition of the receiver, we quote from the opinion of Judge Gilbert in Atlantic Trust Co. v. Chapman, 145 Fed. commencing at the middle of page 821:

> "Upon submission of the cause as upon bill and answer, the Trust Company was entitled to the benefit of all denials in the answer of the matters set forth in the petition and all matters properly pleaded in the answer, and the question at issue was what was a proper judgment upon the facts presented by the petition and not denied in the answer

together with the facts properly pleaded in the answer. Reynolds v. Crawfordsville Bank, 112 U. S. 405; Banks v. Manchester, 128 U. S. 244."

"The appellant contends that upon the case now presented the equities are with it and that certain allegations of the petition which stood admitted upon the record when the case was formerly before this court, are now eliminated by reason of denials in the answer, such as the allegation that the expenses were incurred on the motion or request of the appellant, that the receiver acted upon its assurances as to the sufficiency of the property to pay the foreclosure expenses, that the foreclosure was irregular and collusive and that the acts of the appellant contributed to the delay of the suit and its disastrous result. The appellant urges that the receiver himself was the person best acquainted with the situation at all times and that he should have given warning that future expenses might result in a deficit upon a sale, that so far as the final disaster was due to human mistakes, it was due to the mistakes of the receiver and his employees, and particularly to his selection of an engineer at the instance of others, and that the delays which prolonged the receivership until the break down of the dam, were due to matters beyond the appellant's control, such as intervention in the suit by outside parties and the litigation resulting therefrom. The answer sets up reasons, some by way of argument, others by statement of facts, why the appellant should not be held liable for the expenses of the receivership. *It does not deny any of the material facts alleged in the petition.* It alleges as matter of defense that the Canal & Irrigation Company was a quasi public corporation; that all the expenses were incurred by the receiver as the officer and hand of the court, not as the agent of the appellant nor for its benefit, but for the benefit of all concerned, including the public. It alleges, and this is one of the principal defenses relied on, that the appellant

is a corporation enjoying high credit in commercial communities throughout the United States, and that had it been known or understood by persons taking the receiver's certificates that it was personally liable upon them, the certificates would have been readily subscribed at a low rate of interest instead of being placed with difficulty at the high rate of 10 per centum per annum. We do not see how this defense can avail the appellant to avoid its liability. It was bound to know the law and to know the nature of the obligation which it assumed in asking the court to appoint the receiver to manage the property. It must be presumed to have had notice of the progress of the case, the difficulties of the receivership, the expenses thereof and the issuance of receiver's certificates together with the difficulty of disposing of the same. *If its credit in the commercial world would have been of aid in disposing of the receiver's certificates at a lower rate of interest, it had the opportunity to use its credit for that purpose.* It brought the foreclosure suit at the request of stockholders, it is true, but it was not bound to resort to the court or to ask for the appointment of a receiver. *The trust deed gave it the option to sell at public auction the entire property in case of default in the payment of interest.*"

The answer by not denying the material facts of the receiver's petition admits them to be true, and the question to be determined is still one of law, the right of the Circuit Court to grant the receiver the relief asked for. The same proposition that was before the Court when the demurrer was presented in that Court.

THE CIRCUIT COURT HAS POWER TO COMPEL PETITIONER TO PAY THE DEFICIT OF THE RECEIVERSHIP.

This is not a case where complainant was compelled to ask a court of equity to take charge of the property and operate it for three years before asking for an order of sale.

The trust deed provided for a sale in the event of a default in the payment of interest (p. 15).

The defendant was not offering any opposition. No one was disputing or attempting to dispute the validity or priority of the lien created by the deed of trust. And thus a proceeding that might have been wound up in a few months was allowed to drag along for many years.

Much of the mob violence threatened the receiver was due to the fact that like the defendant he had failed to pay for services rendered.

But the services required to operate the defendant's property for the period of two or three months while the property was being advertised for sale pursuant to the terms of the deed of trust, would have been infinitesimal as compared with the expenses necessarily incurred by the Court in operating this property under the most trying circumstances during a period of four years and more.

Having said this much as to there being no real necessity for the receivership, we turn now to the consideration of the question; *the power of the Circuit Court to enter a deficiency judgment.*

And this makes it necessary to consider briefly the powers, duties and obligations of a receiver.

Says Alderson on Receivers, Edition 1905, Sec. 2:

> "The office of receiver is treated as one of confidence and trust, whose powers are conferred and defined by the order of the court (citing authorities). A receiver is the officer, the executive end, of a court of equity. His duty is to protect and preserve, for the benefit of the persons ultimately entitled to it, the property over which the court has found it necessary to extend its case. He occupies a fiduciary relation to the owner of the property and all who may have claims to it. He is subject in all things to the direction and control of the court whose officer he is; and when in doubt about his duty in any particular it is his privilege to apply to the court for specific instructions."

To the same effect the Court in Knickerbocker v. McKindley Coal & M. Coal, 67 Ill. App. 294, affirmed in 172 Ill. 535, says:

> "A receiver is the hand of the Court. The Court is an instrumentality resorted to by the parties for their convenience. A receiver is, threfore, an agent appointed by the Court to serve the parties interested."

Pomeroy in Vol. 5, Section 62, Equity Jurisprudence, says:

> "A receiver is a person standing indifferent between the parties, appointed by the Court as a quasi officer or representative of the Court, to hold, manage, control, and deal with the property which is the subject matter of or involved in the controversy, under the direction of the Court, during the continuance of the litigation" (citing numerous cases to the same effect).

In railroad receiverships (and the case at bar is similar) it has been uniformly held that the Courts have the power to decree reimbursement to the receiver out of the income of the property and if that is not sufficient then out of the corpus before payment of the mortgage debt is allowed.

And the theory upon which Courts have thus proceeded is that the Court has pledged its faith to the payment of the expenses of the receivership, for, as every one knows, the Court has no property of its own with which to operate the railroads, and it must, therefore, in order to keep faith with those whom it employs, redeem its pledge by either resorting to the fund brought into Court or else to the party at whose instance and upon whose showing it was induced to undertake the management of the property.

This power is inherent. It does not depend upon consent or arise from contract.

Says Alderson on receivers, Section 332:

> "But the powers of the Court to preserve the property and keep it in a good and safe condition has been declared 'does not depend on consent or on prior notice'."

Again, the same author says in Section 611:

> "It is a general principle that, when a trust fund is brought into Court for administration and distribution, it must bear the expenses incurred in the proceedings, and they must be paid in preference to all other claims against it."

But while, as we understand it, appellant concedes the foregoing to be the law concerning the income of the property, and also the corpus, it is asserted that the Court is without the power to decree a deficiency against a complainant personally, when the income together with the fund administered, are inadequate to meet all the expenses incurred by the Court through its receiver.

If a Court has the power to protect itself to a certain extent, why not to the fullest extent?

If a Court has the power to redeem some of its pledges by resorting to the fund in its possession for that purpose, why has it not the power to redeem all of its pledges by resorting to the party that induced it to appoint the receiver, assuming that such party is able to respond?

Property cannot be administered by the Court and kept a "going concern," without expense.

Shall the Court knowingly order expenses to be incurred that it has no intention of seeing paid?

When the Court places a receiver in charge of property on representations made to it by a complainant, with orders to contract such indebtedness as appears needful, is it to be presumed that no reliance shall be placed upon the Court for the payment of this indebtedness?

Courts never would have gone to the length of making receivers' certificates a lien upon the fund brought into Court prior to the lien of the mortgage, except

for a desire to proclaim to every one dealing with the Court either as a lender of money or as an employee that justice would be meted out to him—to him, as well as to the parties.

Shall the Court dispense justice to the *parties* to a suit and deny it to *its own officers and employees?*

Ordinarily the fund is sufficient to protect the Court and its officers and employees, and the Court is not compelled to proceed further. And this is why there is a dearth of decisions on the precise question presented by the case at bar, namely, the power of the Court to look beyond the property administered upon where it fails, or proves insufficient to the complainant to make up the deficiency.

That the Court has this power in a proper case, and the case at bar is such an one, we have no doubt. And right here the opinion of Judge Ross in Chapman v. Atlantic Trust Company (supra) seems pertinent. We quote from top of page 266:

> "It is not pretended that the Court below was without jurisdiction of the parties to the suit, or of the subject matter, nor that it was without jurisdiction to appoint a receiver to take possession of and hold and operate the property pending the litigation. It follows, as a matter of course, that it had the power and that it was its duty to overlook and adjust the accounts of the receiver, and to *adjudge how and when the costs and expenses of the receivership should be paid*—subject, of course, to correction, by appropriate proceedings, of any error committed in that respect. And in this case the Court below, in its decree confirming the sale of

> the property, in express terms, retained jurisdiction of the cause for those purposes. It was in pursuance of that express provision of the decree of confirmation that the report and petition of the receiver was filed, and action thereon by the Court sought, thus not only invoking a power expressly reserved in the decree of confirmation, *but one of the powers of the Court incident to its unquestioned jurisdiction* over the parties to and the subject-matter of the suit."

To the same effect is the opinion in Knickerbocker v. McKindley C. & M. Co. (supra), 67 Ill. App., quoting from page 295:

> " It follows that while the estate in the receiver's hands is the primary fund out of which his proper expenses and compensation are to be paid, if the estate be insufficient or fail, the parties for whom he has acted may be compelled to pay the expense incurred for their benefit."

The same doctrine is also laid down in Pacific Bank v. Madera Fruit Company, 124 Cal. 525, Ephraim v. Pacific Bank, 129 Cal 589, and also in the cases cited by Judge Ross in Chapman v. Atlantic Trust Co., 119 Fed. 270, in connection with which he says:

> " We are therefore of opinion that the complainant is liable for the deficiency shown by the decrees already rendered in the cause, and for such further deficiency as may be properly ascertained, and such is the decided weight of authority."

Even in the Farmers Loan and Trust Company, 12 Oregon Pacific R. R. Co. (31 Or. 237), the principal case relied upon by petitioner, the question of the Court's power to look beyond the proceeds of the property for

the purpose of re-embursing the employees of the Court is conceded, the Court using the following language:

> "If, therefore, upon an application for the appointment of a railroad receiver, it appears probable that the income and corpus will prove insufficient to pay the expenses and liabilities thereof, we have no doubt that the *Court may require of the plaintiff* as a condition to such appointment a *guaranty of the payment of the expenses of such officer,* and, if at any time after the appointment has been made, it becomes apparent to the Court that it will be unable to pay and discharge the present or future liabilities incurred by its executive officer and manager, it should refuse to continue the operation of the road under the receiver, unless its expenses are guaranteed."

The only difference between the opinion of Judge Ross and that rendered in the Oregon case is that in the former the Court claims to have jurisdiction *after the deficiency occurs,* to look to the complainant for re-embursement, while in the latter the Court claims to have jurisdiction to compel complainant to guarantee the payment of a *deficiency that may occur,* as a condition of permitting the continuance of the receivership. In these two cases the Courts seem to entertain no doubt of their jurisdiction—differ only concerning the manner of its exercise.

THE FINALITY OF THE FORECLOSURE DECREE.

Having shown that a court of equity has the inherent power in a proper case to look beyond the income of the property, and the corpus, to the party responsible for

the appointment of the receiver, we come now to the consideration of the question whether the decree of foreclosure in this case is a "final decree" by which the receiver is concluded from enforcing his claim against the complainant personally.

Complainant holds that the *decree of foreclosure and sale was final,* and that the decree of confirmation of sale rendered about a year later, in which the Court in express terms retained jurisdiction of the cause and of the parties thereto "*until redemption is made or title "deeds have passed, as herein provided, and until the "coming in of the reports of the said clerk and receiver "herein provided for, and the final action of the Court "thereon, and the final payment of the balance of the "costs and expenses of this Court and its officers, and "of the advances made and the indebtedness incurred by "said receiver which have been or may be allowed by the "Court in the management and care of the property "placed in his charge, or until further and final order of "the Court in that behalf,*" was a mere nullity. Appellant contends that the decree of foreclosure and sale being final, not only as to the parties to the foreclosure proceedings, but to the receiver as well, the Court was without jurisdiction to compel complainant to make up the deficiency. And here we might say, in passing, that we cannot understand in view of this decree of confirmation expressly providing for all the expenses of the receivership by which complainant was put on notice as to its personal liability to pay such expenses, the receiver can be charged with laches because he did not

sooner apply to the Court for the relief which by the decree of confirmation the Court expressly stated he was entitled to receive. Forbearance on the part of the receiver should not be considered as laches, and complainant should have objected to the decree of confirmation and not have acquiesced therein if it considered the Court in error in undertaking to hold it personally responsible. But we will consider the question of laches later.

The reason that complainant did not take exception to the decree of confirmation is because such decree was considered to be a nullity and did not operate to give the Court jurisdiction to entertain the prayer of the final report of the receiver.

The petitioner asserts that in receivership cases, after the rendition of a decree of foreclosure and sale, the Court becomes powerless to protect its officers and employees unless the decree is reopened and modified—notwithstanding the fact that the receiver may be compelled, by the very order of his appointment, to keep the property a "going concern" for many months before confirmation of sale is ordered, and for many more months thereafter.

There might be something in this contention if the receiver could be held responsible for the decree of foreclosure. But he is not. It is prepared at the instance of the complainant to the suit. The receiver is not a party. To all intents and purposes he is a stranger to the litigation as regards any right of his to interfere

with any order of the Court concerning it. He cannot object to the decree of foreclosure. He cannot appeal from it. It is not made for his benefit. It is intended to adjudicate the rights of the parties only.

Mr. Justice Brewer in Bosworth v. Terminal R. Association, 174 U. S. 187, says:

> "Neither can he question any subsequent order or decree of the Court distributing the estate in his hands between the parties to the suit. It is nothing to him whether all of the property is given to the mortgagee or all returned to the mortgagor. He is to stand indifferent between the parties, *and may not be heard either in the Court which appointed him, or in the Appellate Court*, as to the rightfulness of any order which is a mere distribution between the parties."

It follows, therefore, that if a receiver cannot appeal from a decree of foreclosure, how can he be concluded by such decree? How can it be *final* as to him?

A decree final as to the parties may always be appealed from or excepted to by them, within the time allowed by law, but the receiver has no such right.

While the receiver may not appeal from a decree of foreclosure and sale, he may nevertheless appeal in certain instances.

His time to appeal does not commence to run until the close of the administration of the Court of the property. When his work is done, and when the Court upon his final petition refuses to settle his supplemental accounts, and refuses to consider his application for

re-embursement, as in this case, then he may appeal, and not before.

This is the " final decree " so far as he is concerned.

In this connection note what Judge Ross says in Chapman v. Atlantic Trust Co. (supra), 119 Fed. 266 (middle of the page):

> "There is just as little merit in the contention that the *order appealed from is not a final order.*
>
> " It is a mistake to say that by the order the Court below did not refuse to settle the accounts of the receiver. The petition was for the settlement of the account, as well as for an order that the complainant in the cause be directed to pay the full amount of the deficiency shown thereby. The order to show cause directed the complainant to appear at a time and place designated, and show, if he could, why the relief should not be granted. Upon hearing and considering the matter, the receiver's application, which, as has been said, included a prayer both for the settlement of his accounts and a judgment against the complainant for the deficiency shown thereby, was denied, and the order to show cause discharged. Nothing could more effectively and completely end the application than that order. *It was final in the strictest sense, and it was an order from ' which the receiver was entitled to appeal*, for two reasons: First, because the account the receiver sought to have settled, and allowed and ordered paid, contained an unpaid balance of $3,105.72 that had theretofore been adjudged by the Court to be due him on account of expenses of the receivership; and, secondly, because *it was his duty to exercise his powers as receiver and see that the certificates that he had issued and sold under the authority of the Court, as well as all other legitimate expenses of the receivership, be paid. We regard the decision of the Supreme Court in the case*

> *of* Bosworth v. Railway Co., 174 U. S. 182, 19 Sup. Ct., 625, 43 L. Ed. 941, *as full authority for the appeal by the receiver.*' "

The cases cited by counsel to the effect that a decree of foreclosure and sale is *final* will be found upon investigation to have no application to a receiver in charge of property belonging to *an irrigation company or a railroad.* They are cases where nothing more was to be done than to execute the original decree. They are not cases relating to property required to be kept a " going concern " for months and years after the rendition of the decree of foreclosure and sale.

In Ray v. Law, 3 Cranch 179, cited by the learned counsel for petitioner, which was not a receivership case, though one relating to a mortgage foreclosure of real estate the Court said:

> " We can do nothing without seeing the record, and the papers offered cannot be considered by us as the record. The Court, however, is of the opinion that a decree for a sale under a foreclosure and mortgage is such a final decree as may be appealed from."

Here no property was required to be kept in the custody of the Court and operated at great expense. There was nothing more to be done than to enter the *decree which positively fixed the rights of the parties.*

Again, in the Palmyra, 10 Wheaton 504, the case of Ray v. Law is referred to, the Court saying:

> "In that case, which was an appeal in an equity cause, there was a decree of foreclosure and sale of the mortgaged property. The sale could only be

> ordered after an account taken in the sum due, or ascertained in some other way, and the usual decree is that unless the defendant shall pay the sum in a given time the estate would be sold. The decree of sale, therefore, is in such a case *final upon the rights of the parties* in controversy and leaves only ministerial duties to be performed."

In these cases no receiver was attempting to appeal from a judgment of foreclosure, nor was any officer or employee of the Court affected by the judgment. The only persons to whom the judgment was directed were the *parties to the action.*

Whiting v. Bank of U. S., 13 Peters 6, cited by counsel, was another mortgage foreclosure suit in which no receiver was appointed.

The dispute was between the parties as to the finality of the decree of foreclosure for the purposes of an appeal.

In Forgay v. Conrad, 6 Howard 201, also cited by counsel, the purpose of the suit was to set aside fraudulent deeds by an assignee in bankruptcy.

The deeds were decreed to be fraudulent and the judgment setting them aside final.

The Supreme Court of the U. S. in Beebee v. Russell, 19 Howard 283, defines very clearly *the difference between decrees that are final from those that are not* It reviews the Palmyra case, which was one of libel for tortious seizure, where restitution, costs and damages were decreed. The amount of damages not having

been ascertained, the decree was not final and the appeal dismissed.

Also

Ray v. Law, 3 Cranch 179;
Whiting v. Bank of U. S., 13 Peters 6, and
Forgay in 6 Howard 201.

showing that these cases do not conflict with the proposition of law that

> "reference of a case to a master, to take an account upon evidence and from the examination of the parties, and to make or not make allowances affecting the rights of the parties, and to report his results to the Court *is not a final decree;* because his report is subject to exceptions from either side, which must be brought to the notice of the Court before it can be available. It can only be made so by the Court overruling the exceptions, or *by an order confirming the report with a final decree for its appropriation and payment.* We have just said that *decree is final when ministerial duties are only to be done to ascertain a sum due.*"

But Beebee v. Russell (supra) was not a receivership case, and therefore the power of Court to settle the accounts of a receiver, etc., after decree of foreclosure and sale, was not a matter that the Court could pass upon.

That a decree of foreclosure is not final as to the receiver of an irrigation company required to be kept in operation is abundantly shown by the authorities.

In Pacific Bank v. Madera Fruit Company the Court found that

"on January 31st, 1894, the plaintiff filed its complaint and among other things asked for the appointment of a receiver to take charge of a large amount of real and personal property. One S. Ephraim was at the request of plaintiff appointed receiver to take charge of all the property described in the complaint. He filed the proper bond, took the oath, and thereupon took charge of the property as such receiver.

"Thereafter, on March 6th, 1905, before the issuance of any summons or the appearance of any defendant, the plaintiff filed with the clerk a written dismissal of the case, and *judgment of dismissal was accordingly entered by the clerk.* Thereafter said receiver filed his account and petition and asked the Court to settle the same and fix his compensation, etc. The plaintiff thereupon made a special appearance and filed a written motion to dismiss the account and petition of the receiver on the ground that by the judgment of dismissal of the said action the Court had lost jurisdiction to settle the said account. The Court overruled said motion and proceeded to hear the account of the receiver, and after hearing the evidence made an order settling the account. From this order the plaintiff appealed. *The only question argued or presented on this appeal was as to whether or not the plaintiff having dismissed the action the Court had jurisdiction* to hear and settle the accounts of the receiver. *The Court held that it had such jurisdiction, and we think its conclusion correct.*

In Beach on Receivers, Section 796, the author lays down the rule as follows:

" 'The end of the suit, its final adjudication, gives cause for the discharge of the receiver, but does not ipso facto effect his discharge, which results only from an order or decree of Court so directing. *After the settlement of the suit, the receiver must*

have time and opportunity to prepare and present his accounts and for the adjustments of the details of the receivership. The dismissal of the action does not discharge the receiver from accountability to the Court which appointed him. *He is an officer of the Court and subject to its orders in relation to the property placed in his hands as receiver until discharged by the Court.'* The same rule is given by High on Receivers, Section 833, and is stated as follows:

"It is to be observed, however, that the abatement of the action, or the entry of final judgment therein, does not have the effect of discharging the receiver, ipso facto. And although as between the parties to the litigation his functions have terminated with the determination of the suit, he is still amenable to the Court as its officer until he has complied with its directions as to the disposal of the funds which he has received during the course of his receivership."

The Court cites the following cases in support of this view:

State v. Gibson, 21 Ark. 140;

Ireland v. Nichols, 40 Howard Pr. 85;

Whiteside v. Prendergast, 2 Barb. Ch. 471;

Field v. Jones, 11 Ga. 418;

Garniss v. Supreme Court, 88 Cal. 415.

And the Court, in concluding, uses the following language:

"*If the Court below lost jurisdiction of the case by virtue of the dismissal* so that it could not settle the accounts of the receiver, nor make any disposition of the funds in his hands, how would the account be settled or the funds disposed of? The money on hand and collected by the receiver is in contemplation of law in the hands of the Court,

to be disposed of as the law directs. The expenditures made by the receiver for the preservation of the property, and under the orders of the Court and at the request of the parties, should be repaid by some one. If the Court in which the receiver was appointed, cannot, after the dismissal of the case, settle and adjust the accounts of the receiver, to what jurisdiction will he resort? *The dismissal of the case was the end of it as between the parties,* but we think the Court still retained the power to settle the accounts of its receiver and to direct the application of the funds in his hands."

The foregoing is a very clear, concise and strong argument in favor of the proposition that a final decree is not conclusive as to the receiver who is not a party to the litigation.

A judgment of dismissal is as much a *final decree* as is a decree of foreclosure and sale. If the Court does not lose jurisdiction by the entry of a judgment of dismissal then it cannot lose jurisdiction to settle the accounts of the receiver after the rendition of a decree of foreclosure and sale by which only the rights of the parties to the litigation are fixed and determined.

In the case of Ephraim v. Pacific Bank (supra) the Court uses the following language:

"It is urged by the respondents, in support of their demurrer and of the judgment thereon, *that inasmuch as the Court did not designate the persons by whom the expenses of the receivership should be paid, the only remedy of the receiver was to collect them out of the property of which he was placed in charge, and that, having failed to collect them in this manner, he has no right of action therefor against the parties to the suit.* It is unquestionably

> the general rule that the costs of a receivership are primarily a charge upon the fund in his possession, and are to be paid out of that fund. But it is by no means the rule that a receiver must in all cases look to that fund for his reimbursement, and has no other remedy if for any reason that fund is not available."
>
> "Mr. Beach says (Beach on Receivers, Section 773):
>
> "'But it may sometimes happen that a direct liability is imposed upon the parties to the action, or upon some of them, for the remuneration of the receiver. This may result from the irregularity of the appointment, or *from the insufficiency of the fund,* or out of the agreement between the parties.'"

The Ephraim case came before the Supreme Court a second time. It was then determined that the receiver was not entitled to have the expenses of the receivership paid by plaintiff because he had asked for the appointment, *agreeing to look to the property solely for his remuneration.*

Ephraim v. Pacific Bank, 136 Cal. 646.

This decision negatively supports the proposition for which we are contending, the right of the receiver to compel the complainant at whose instance he was appointed to make good the expenses of the receivership *after the termination thereof, and without the necessity of attempting to modify or appeal from, the decree of foreclosure and sale.*

Moreover, in the case at bar, it cannot be urged that the receiver made any request for his appointment, or

made any agreement as to how or when the expenses of the receivership should be paid. So that the failure of Ephraim to recover does not effect the rights of the receiver in this case.

Referring again to the Bosworth case, 174 U. S. 183 (supra), we desire to call the Court's attention to the fact that there it was held that where in a foreclosure of a mortgage on the property of a railroad company the receiver is decreed to pay the claims of an intervener, *the receiver may appeal, although prior to the decree* the property had been sold under the decree and had actually passed out of his hands.

The theory upon which he was allowed to appeal depended upon the proposition that it was his privilege to protect the property and the parties of the litigation against the claim of an intervener.

And here we ask if a receiver may appeal from an order not affecting him personally, made by the Court after the property had passed out of his hands for the benefit of a party to the litigation, why may he not appeal when the Court refuses to settle his final accounts, etc.? Why is he concluded by an order of foreclosure and sale that does not effect him personally and from which he could not appeal, if it did, and denied the right to appeal from a final order or decree made directly against him, by which he may be made bankrupt?

And right here it is interesting to note what the Court says in Bosworth v. Railroad (supra) of the rights, duties and obligations of a receiver in relation to the property of which he has taken possession under the

order of Court so different from what the Supreme Court of Oregon says in Farmers Loan & Trust Company v. Oregon R. R. Co., 31 Oregon 237, supra, on the same subject.

> "It becomes important to consider what are the rights and duties of a receiver in respect to claims made against the estate in his possession. It is often said that he is merely the hand of the Court which has appointed him; and for certain purposes that is not an inapt expression. He is charged with the duty of carrying into execution the orders of that Court, but he is also a custodian of property, *and has by virtue of such custody certain obligations to the parties owning or interested therein.*
>
> "First. A receiver may defend, both in the Court appointing him and by appeal, the estate in his possession against all claims which are antagonistic to the rights of both parties to the suit. For instance, he may thus contest a claim for taxes because if valid they are superior to the rights of both parties; in a case like the present superior to the rights of mortgagor and mortgagee.
>
> "Second. He may likewise defend the estate against all claims which are antagonistic to the rights of either party to the suit, subject to the limitation that he may not in such defense question any order or decree of the Court distributing burdens or apportioning rights between the parties to the suit, or any order or decree resting upon the discretion of the Court appointing him. As this is a matter especially pertinent to the present controversy it may be well to consider briefly the scope of this proposition: A suit is brought by a mortgagee to foreclose his mortgage, and a receiver is appointed to take possession of the mortgaged property. The right to have a decree of foreclosure and sale is an absolute right on the part of the mortgagee, flowing from a breach of the conditions

in the mortgage. But the appointment of a receiver is a matter resting largely in the discretion of the Court—not, of course, an arbitrary, but a legal discretion—and depending, not simply upon the breach of a condition in the mortgage, but also upon the question of relative injury and benefit to the parties and the public by the taking of the property of the possession of the mortgagor, and placing it in the hands of a receiver. In appointing a receiver the Court has a right within certain recognized limits to prescribe the terms and conditions of the appointment. *A receivership is not essential to a foreclosure and sale, and the Court is charged when an application therefor is made, with the duty of inquiring whether, under all the circumstances, considering the interest of the parties and the public it is wise and proper to take possession of the property.* It may in its judgment be necessary to appoint a receiver without prescribing any terms. It may be that the interests of the parties or the public require that the appointment shall be made subject to certain conditions. *Now these conditions, whatever they may be, are beyond the challenge of the receiver.* He may not say directly or indirectly 'I accept the appointment, I take charge of the property, but I repudiate the terms and conditions imposed on the receivership.' Whether under the present state of the statutory law in reference to appeals any review can be had of the terms of such an order, it is clear that a receiver, whose rights spring from the appointment, cannot be heard to question them.

"Third. *Neither can he question any subsequent order or decree of the Court distributing the estate in his hands between the parties to the suit. It is nothing to him whether all of the property is given to the mortgagee or all returned to the mortgagor. He is to stand indifferent between the parties and may not be heard either in the Court which appointed him, or in the Appellate Court, as to the*

rightfulness of any order which is a mere order of distribution between the parties. In this connection it must be noticed that an intervener, although for certain purposes recognized as a party to the litigation, is not such a party as comes within the scope of the limitation just announced. He is one who comes into the litigation asserting a right antagonistic or superior to that of one or both of the parties thereto, and a receiver, who represents, so far as the property is concerned, the interest of the parties, may rightfully challenge his claim; *provided that in such challenge he does not question any orders of the Court heretofore referred to.* Let us take some illustrations: A suit is brought to foreclose a mortgage; a receiver is appointed, and the mortgaged property taken possession of. A party intervenes, asserting that he has a claim against the mortgagor and the property, but conceding that it is subordinate to the claim of the plaintiff mortgagee. With that concession the mortgagee stands perfectly indifferent to the question whether the claim be allowed or not. Still, it cannot be doubted that in such a case the receiver, holding the property against which a claim is made, can defend, and defend not only in the Court appointing him, but also by appeal. In that defense he not only represents, it may be said, the mortgagor's interests, but also protects the property in his possession.

"Take another case: An intervener presents a claim against the mortgaged property which the mortgagor admits. There is, therefore, no defense to be interposed in behalf of the defendant mortgagor, no protection to be sought for the property, and the only question is whether such claim, admitted by the mortgagor, is to be satisfied out of the mortgaged property prior to the claim of the mortgagee. The latter is the only party who has an antagonistic relation to the intervener. Now, the receiver, who represents both mortgagee and mortgagor, both plaintiff and defendant, so far as

the custody of the property is concerned, is entitled to defend against this claim of priority made by the intervener, and may defend both in the Court appointing him, and also by appeal. *It is true in such defense he may not be heard to say that the terms and conditions imposed in the order of his appointment were improper,* but he may defend on the proposition that the claim presented does not come within those terms and conditions. Whatever right, if any, the mortgagee plaintiff may have to question, in resisting such claim, the validity of the terms of the appointment, the receiver cannot do so; and the only defense he can make is that the claimed priority has no foundation in the terms of the order; or, if it be a matter entirely outside of those terms, that it has no foundation in any recognized legal or equitable principle.

"In the case at bar one defense, as shown by the exceptions taken to the report of the master, was that the claim of the intervener was not against the estate, but against some third party. That defense the receiver had a right to make. We do not mean that he alone can act; we do not stop to inquire what rights either party to the suit may have in this respect. All we now decide is that the receiver is a proper party to make the defense. And when he alone makes it, when he carries on the litigation in his own name as receiver, then as the representative and custodian of the estate he can, subject to the supervision of the Court, bind it by admissions made in good faith in the progress of the litigation. And as in the Appellate Court, after the appeal had been perfected, he being the only party to the appeal, admitted that it was a just claim against the mortgagor and within the priority over the mortgage prescribed in the order of appointment, his admission showed that the allowance was right, and that the decree ought to be affirmed. But still, until that admission was made, there was a pending dispute, and he was a proper person to appeal from the allowance.

"Fourth. *He may appeal from an order or decree which affects his personal rights,* provided it is not an order resting in the discretion of the Court. *Thus he may not appeal from an order discharging or removing him, or one directing him in the administration of the estate, as for instance to issue receiver's certificates, to make improvements, or matters of that kind, all of which depend on the sound discretion of the trial Court.* He may *appeal from an order disallowing him commissions or fees, because that affects him personally,* is not a matter purely of discretion, and does not delay or interfere with the orderly administration of the estate.

"Fifth. His right to appeal from an allowance of a claim against the estate does not necessarily fail when the receivership is terminated to the extent of surrendering the property in the possession of the receiver. It is a common practice in Courts of equity, anxious as they are to be relieved from the care of property, to turn it over to the parties held entitled thereto, even before the final settlement of all claims against it, and at the same time to leave to the receiver the further defense of such claims, the party receiving the property giving security to abide by any decrees which may finally be entered against the estate. An admission that the railway property had been turned over to the purchaser is not therefore of itself conclusive against the right of the receiver to appeal. And the fact that the trial Court allowed the appeal must in the Appellate Court be taken, in the absence of other evidence, as sufficient authentication that such reservation of authority had been made in the order directing the surrender of the property."

We have quoted quite extensively from the foregoing case because it presents concisely nearly the whole law upon the subject of the relation of receivers to the parties, to the Court and to the property. It is an instance

of a railroad receivership, and is a complete answer to the argument of the Trust Company concerning the receiver's right of appeal in the case at bar.

THE EQUITIES OF THE CASE.

Having shown that the Circuit Court has the inherent power to grant the relief asked for by the receiver, and having shown that the receiver is not concluded by the decree of foreclosure and sale, but that such decree is not *final* as to him, we come now to the consideration of the equities of the case.

Appellant asserts that the equities of the case are against the receiver. Why? Because it is claimed that: 1st. Receiver's certificates were issued payable only out of the fund—a fact charged by the answer, but shown to be untrue by the record, which was made a part of the answer by reference and incorporation. The record contains no such fact. Appellant cannot adopt the record and repudiate it in the same pleading.

2nd. The holders regarded the investment as one involving great risk owing to the fact that the certificates bore interest at 10 per cent, in spite of the high credit of the complainant, upon which no one relied.

Is this a sufficient reason for asserting that the equities are against the receivers?

Is it a sufficient argument to assert that because receiver's certificates do not sell readily even upon an agreement on the part of the receiver to pay 10% inter-

est, that the holders thereof are convinced that a complainant residing 6,000 miles distant is not personally liable therefor? Should it not rather be said that because complainant avoids making any purchase of these high interest bearing certificates that there is something wrong with the property either as to the title or value thereof? Or that possibly the complainant had brought the property into Court for purposes of speculation or exploitation pending the financial stringency everywhere prevailing?

When a party asks a Court to administer property and will not buy receiver's certificates bearing a high rate of interest, why should an outsider and a stranger to the proceeding be expected to look with favor upon the investment?

Surely the equities are not against the receiver, because receiver's certificates could not be easily floated—because they were viewed with suspicion.

What answer is there to the question, "Why does not the Atlantic Trust Co. buy these certificates?" Does it not know that the property is valuable? If not, why is the Court asked to operate the property?

What is true of certificates is true of all other expenses.

TIME CHECKS.

Much criticism is directed against the receiver for issuing time checks. What are they? Merely evidences of the fact that certain persons had been employed by

the receiver and had not been paid—either in money or certificates. These persons were necessarily employed. They are entitled to payment equally with those who furnished money. It was a matter of no moment whether the receiver had sufficient money to hire workmen, or had the workmen themselves.

3rd. Appellant further claims that it is admitted that at no time during the receivership or thereafter, until all right either of redemption or of appeal had expired, did any certificate holder, or the receiver, or anyone else, make a claim that the Atlantic Trust Company was responsible.

Petitioner is mistaken. The decree of confirmation was itself a declaration made by the Court on behalf of the receiver and his employees that the complainant would be held personally liable for any deficit (p. 112).

And the receiver took his appeal within the time allowed by law.

The decree of foreclosure and sale contained no provision relating to a deficiency, and this for the very good reason that complainant induced the Court to fix the upset price at $120,000. There could be no deficiency unless the Court should reduce the price.

To have fixed the minimum price of the property at $120,000 was tantamount to a declaration on the part of the complainant, for whose benefit the order was made, that the usual course would be pursued by the Trust Company—the taking in of the property at about that price if no better bid was offered.

It would have been an impertinence on the part of the receiver to have attempted to have meddled with a decree drawn agreeably to his interests.

No objection was made by complainant to the order of confirmation of sale, nor did it thereafter make any effort to obtain the property for its benefit. It was perfectly willing that the receiver and his counsel should enjoy whatever benefit could be derived from remaining in control of property that had been operated for many years by them without a sufficiency of funds.

Much is said about the fact that the property was bid in for an amount only a little ($3,000) in excess of the compensation allowed the receiver and his solicitor.

But in this connection we desire to direct the Court's attention to the fact that when the compensation of the receiver and his solicitor's fees were fixed by the Court without objection by anyone, it was in evidence that $175,787.15 (p. 30) had been expended on the property before the receiver was placed in charge thereof, and that in complainant's bill of complainant a solicitor's fee of $10,000 was prayed for. These matters, taken in connection with the making $120,000 the minimum price of the property, must be considered as equivalent to positive declarations of complainant that there would be no deficiency.

The highest bid that Judge Morrow could induce anybody to give in cash was $12,500. This was $8,500 less than the amount offered by the assignee of the receiver, whose bid was $21,000—$3,000 cash to cover costs of

sale and the balance the claims of the receiver and his counsel.

The Alantic Trust Company made no offer whatever. The property was not even worth $12,500—to the Trust Company. It was considered by it to be practically worthless and that is why the receiver and his solicitor were welcome to it.

The decree of confirmation was also considered to be not worth objecting to.

The conduct of the Trust Company shows that it did not intend to redeem—and as for being deprived of the right of appeal by anything that the receiver has done or omitted to do, that cannot be seriously considered for a moment. Appeal from what? The decree of foreclosure prepared by itself, in which all of the expenses of the receivership are adjudicated, having been approved by the Master in Chancery? If the expenses incorporated in the foreclosure decree were not correct complainant should have disputed them.

The decree of confirmation might have been appealed from or excepted to. But no steps were taken by the Trust Company whereby to modify or set it aside.

In Chapman v. Atlantic Trust Company (supra), page ——, the Court says:

> "*Nor does any objection appear to have been at any time taken by the complainant to the sale or to any of the provisions of either the original decree of foreclosure and sale or that confirming the sale.* In and by the latter, as has been shown, the *Court below in express terms retained jurisdiction* of the subject matter and the parties thereto."

Judge Gilbert in considering the proposition here involved in Atlantic Trust Co. v. Chapman, page 822, says:

> "The appellant relies on the defense of laches as against its liability for the costs incurred by the receiver. It has not specified the laches in pleading that defense in its answer, but it argues that the facts show that it was kept in unsuspecting quiet until the time had expired when it could either bid on the foreclosure sale or redeem from that sale, or appeal from the foreclosure decree, and that had there been any claim that it would be held responsible for the deficit caused by the receiver's management of the property, there can be no doubt that it would have protected itself by bidding at the sale up to the full amount of the deficit, whereby it would have the property to exploit and sell.
>
> "*This argument is based upon the assumption, unsupported by anything discoverable in the record, that the property in the foreclosure sale, sold for less than its full value. We are not warranted in assuming that it sold for less. If it did, was it not the duty of the Trust Company, protecting the bondholders, to see that it did sell for its full value or to redeem in case it did not?* Its duty to avoid payment of receiver's expenses was no greater than its obligation to its cestuis que trustent to protect their interests in the foreclosure sale. *We can discover no ground for imputing laches to the receiver. It was not among his duties to advise the appellant of his understanding of its legal liability to him. It was its duty to know it.*"

4th. "That it appears that the bulk of the certificates " were not regarded at the time as having been issued " for the benefit of those other persons whom the re- " ceiver was bound equally to consider, namely, that " portion of the public for whose benefit the canals and " ditches and laterals and dams had been constructed,

" and up to that time maintained." (Brief of appellant, p. 43.)

No doubt the public received some benefit from the operation of the property, and that some of the public were particularly benefited by being furnished water, and for that reason they assisted the receiver to maintain the property. But the Trust Company could not be persuaded by anything done in the premises to expend a dollar either for its own benefit or the benefit of the property, or the Court whose services it requested.

The preservation of the property would, of course, be beneficial to the public, but the public pays for the benefit it receives by buying the water. It does not get something for nothing.

We cannot see that the benefit the public received has any bearing upon the question of appellant's liability, any more than the benefit the public receives from the operation of a railroad in the hands of a receiver serves to absolve the parties therein from liability.

Are the equities against the receiver merely because the public may have had erroneous notions about receiver's certificates concerning the question of the apportionment of benefits?

The fact still remains that *this property was brought into Court by appellant* and not by the public, and remained there for years with full knowledge upon its part that the public had no power to bring the receivership to a close.

And therefore it must be held that the appellant was the party beneficially interested.

But appellant says: "Non constat, but had the par- "ties both asked an abandonment of the irrigation "service pendente lite, the Court might have considered "it in the public interest to disregard their wishes."

True enough. But, before disregarding their wishes, might not the Court say to complainant: "You are a "corporation enjoying high credit throughout the "United States. You have properly brought this pro- "ceeding. A receiver is necessary. It is the order of "the Court that pendente lite that you provide the "Court with sufficient funds to keep the property a "going concern."

No doubt if complainant was unable to advance the necessary expenses, the Court might be compelled to abandon the property to its fate from sheer inability to induce anyone to accept its promises to pay. There are some things that even a Court cannot do. It cannot operate property without funds or credit. The complaint here had both, but did not use them to aid the Court—and hence the result.

5th. "The receiver cannot charge the complainant "with amounts borrowed on his own responsibility "after consulting only with the farmers of the vicinity, "for the purpose of making repairs through an en- "gineer selected neither by the Court nor by himself "nor by the complainant, but by these very farmers" (brief p. 43).

All that complainant knows of this matter is derived from the various reports of the receiver, to which no objection was made at the time on the part of anyone.

Whatever money the receiver borrowed was in aid of the receivership.

W. C. Pidge was selected as engineer, not by the farmers, but by the receiver. The engineer was competent. He was not less so because the farmers were satisfied with him. He was the old engineer of the company, tried and true. All who knew him had complete confidence in him, including the receiver, and he was known by everyone in that vicinity. The receiver used his own discretion pursuant to the order of his appointment in selecting Mr. Pidge. He did not need the aid of complainant or of the Court to determine the question of his competency or fitness to do the work assigned.

The selection of the engineer was a proper one.

6th. "It was the duty of the receiver, if there was "any reason whatever to anticipate a possible deficit "upon the sale, to apprise the Court and parties "promptly of the danger."

The receiver from the beginning pointed out to the Court the dangers of the situation, the fact that the property was depreciating in value; and when the immense dam of the Canal Company had become undermined he reported fully thereon and suggested that the property be disposed of two years before it was actually sold (p. 39).

And, therefore, it was for complainant to judge whether there ought to be a deficit. The complainant had the right to bid in the property and prevent a deficit if it cared to. And when it induced the Court to fix the minimum price of the property at $120,000, it virtually declared that there would be no deficit.

All that the receiver could do was to report, suggest and ask. These things he did. He performed his full duty in these respects.

7th. It is not true that the receiver as late as August, 1896, or that he ever gave the parties to understand that appellant had not incurred any liability.

THE OREGON CASE.

Upon the right of the receiver to claim the payment of the deficit from complainant personally, it is conceded that the Oregon case is at a variance with the decisions of the Supreme Court of California—notably Pacific Bank v. Madera Fruit Co., 124 Cal. 525, and Ephraim v. Pacific Bank, 129 Cal. 589, and also with the two decisions of the Circuit Court of Appeals above referred to, and with Bosworth v. Railroad, 175 U. S. 183.

But the reasoning of that case appears to us to be in conflict with the inherent power of a Court of equity to protect its officers as well as the parties over which it has assumed jurisdiction.

The reasoning of Judge Ross in Chapman v. Atlantic Trust Company (119 Fed. 267) appears to us to be unanswerable. The judge says:

> "On principle it seems to us impossible to assign any good reason why, if the Court was empowered at the time of the commencement of the suit, or at the time of the appointment of the receiver, to compel the complainant to pay into Court sufficient money to cover the expenses of the receivership, or to give security for such payment, including the payment of whatever certificates might be authorized to be issued by the receiver, the Court has not precisely the same power to adjudge, upon the settlement of the receiver's account, that the complainant make good any deficiency in the matter of such expenses—having by its decree in express terms retained jurisdiction of the cause and of the parties thereto for the purpose of settling the receiver's account and ordering paid the costs and expenses of the receivership. The case of Farmer's Loan Co. v. Oregon Pacific R. R. Co., 31 Or. 237, relied upon and approved by the Court below, does not commend itself to our judgment. The Court there said:
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> " 'It is not perceived upon what ground it can be claimed that, because the expenses of the receivership are allowed without any fault of his to exceed the value of the mortgaged property, thus entirely destroying his security, he must, in addition to the loss of his debt, be compelled to make good the deficit, unless the order of appointment was made upon that condition. He has no control over the acts of the receiver, and if, without his consent, he is to be held responsible therefor, he is liable to absolute bankruptcy and ruin. Such a rule would render the plaintiff's position so uncertain and precarious as practically to preclude him from any protection whatever through the appointment of a receiver pending the foreclosure suit. But the inquiry is made, "Shall not a railroad mortgagee who

applies for and obtains the appointment of a receiver, with authority to operate the road, be held responsible for the liabilities incurred by such officer when they cannot be made out of the property itself?'' We think not, unless such responsibility was imposed as a condition to the appointment or the continuance of the receiver in office. The appointment of a receiver in a suit to foreclose a railroad mortgage is not a matter of strict right, but rests in the sound judicial discretion of the Court; and it may, as a condition to issuing the necessary order, impose such terms as may, under the circumstances of the particular case, appear to be reasonable, and, if not acceded to, may refuse to make the order: 30 Am. L. Rev. 161, Fosdick v. Schall, 99 U. S. 235.

'' 'If, therefore, upon an application for the appointment of a railroad receiver, it appears probable that the income and corpus will prove insufficient to pay the expenses and liabilities thereof, we have no doubt that the Court may require of the plaintiff, as a condition to such appointment, a guaranty of the payment of the expenses of such officer. And if, at any time after the appointment has been made, it becomes apparent to the Court that it will be unable to pay and discharge the present or future liabilities incurred by its executive officer and manager, it should refuse to continue the operation of the road under the receiver, unless its expenses are guaranteed. No Court is bound or ought to engage or continue in the operation of a railroad or any other enterprise without the ability to promptly discharge its obligations, and, unless it can do so, it should keep out or immediately go out of the business. But unless such terms are imposed as a condition of the appointment or continuation in office of the receiver, his employes must look to the property in the custody of the Court and its income for their compensation. They have no claim whatever on any of the parties to

the litigation. They are the employes and servants of the Court, and not of the parties. Their wages are in no sense costs of the litigation; and, although incurred during the progress of the suit, they are not incurred in the suit. They are neither expenses of the plaintiff, nor of the defendant, and are not fees or costs which can be charged against the successful party to the litigation, as is sought to be done in this case.'

"The party who asks for the appointment of a receiver does so voluntarily and because he thinks it to his interest to have the possession of the property in controversy pass into the hands and control of the Court pending the litigation. It is true that the receiver, when appointed, becomes the officer of the Court and not the agent of either party to the suit, but he is appointed to serve the parties interested. He holds the property, and, when operating it, operates it for the benefit of whomsoever shall be finally adjudged to own it. But he cannot be justly held to hold it and operate it at his own expense or that of the Court. Those who render services in and about the receivership are justly entitled to be paid the fair value of such services, and when the issuance of receiver's certificates becomes necessary for the proper preservation of the property, and such certificates are authorized by the Court to be issued by the receiver for money to be used for such purposes, those who buy the obligations are entitled to have them paid. How? In cases like the present, out of the property or its proceeds, certainly. No one, we apprehend, will question that. But the property having been sold for but a trifle more than the amount theretofore allowed the receiver and his attorney for their services in and about the receivership, and they credited with such allowance on their bid, who is to suffer? The complainant, at whose instance the receiver was appointed, or those who, relying upon his acts, based upon the authority and sanction of the Court, in-

vested their money and rendered their services in and about the operation and preservation of the property? It is not difficult to determine on which side of this question are the equities. With due deference we are unable to see any force in the suggestion of the Supreme Court of Oregon in the case cited that, as the complainant in such a suit has no control over the receiver, if he be held liable for the expenses of the receivership, in the event the property prove insufficient to pay them, he may be bankrupted. At the same time it is conceded by that learned Court that where it appears probable that the property will prove insufficient, the Court may require as a condition to the appointment of a receiver a guaranty of the payment of the expenses of such officer, and a like guaranty subsequently, on pain of the discharge of the receiver, when it becomes evident that the property will prove insufficient to pay the expenses. The theory of the manifestly is, that in these two instances the complainant can inform himself of the probable outcome of the property, and if he be not willing to give the guaranty he will not secure the appointment of a receiver in the one instance, or his continuance in office in the other. But why should he not be required to inform himself, also, when no such condition is imposed by the Court? Precisely the same opportunity on complainant's part, and precisely the same duty to inform himself in that respect, exists in the absence of the requirement of the guaranty mentioned. The complainant, whose lien upon the property it is sought to foreclose, in the nature of things must and should be held to have much better information regarding the value of the property and its probable outcome than the Court. Indeed, it is not easy to see how the Court can be properly expected to know anything about it. The appointment of a receiver, if made at all, is usually made at the request of the complainant—occasionally, as in the case at bar, with the consent of

the defendant If the complainant was not willing to pay the expenses of the receivership it asked for, in the event of the insufficiency of the property to do so, it should not have asked the Court to make the appointment, incur the liabilities and pledge its faith to their payment. It was the duty of the complainant to keep informed in respect to the progress of the receivership, the property, and its probable outcome, and whenever it became unwilling to further stand good for any deficiency, to ask the Court to bring to an end the business it undertook and was conducting on complainant's petition.

"We are therefore of opinion that the complainant is liable for the deficiency shown by the decree already rendered in the cause, and for such further deficiency as may be properly ascertained; and such is the decided weight of authority. See Beach on Receivers (Alderson's edition), Sec. 773; Ephraim v. Pacific Bank, 129 Cal. 589; Pacific Bank v. Madera Fruit, etc. Co., 124 Cal. 525; Tome v. King, 64 Md. 166; Howe v. Jones, 66 Iowa 156; Espuella Land & Cattle Co. Ltd. v. Bindle *et al.*, 32 S. W. 582; Knickerbocker v. McKindley Coal, etc. Co., 67 Ill. App. 291; affirmed, 172 Ill. 535; Farmers' National Bank v. Backus, 77 N. W. 142; Bassick Mining Co. v. Schoolfield, 15 Colo. 376; Cutter v. Pollock, 7 N. D. 631."

We have shown:

1st. That a Court of equity in a proper case has the inherent power to compel a complainant to make up a deficit of a receivership.

2nd. That a decree of foreclosure is not a "final decree" by which a receiver is concluded.

3rd. That a receiver has the right to appeal from an order refusing to settle his final and supplemental ac-

counts, and from an order discharging an order to show cause why the deficit of a receivership should not be charged to the complainant personally.

4th. That the answer in the case at bar is an admission of the facts set forth in the receiver's final petition.

5th. That the equities are with the receiver.

Wherefore the judgment of the Circuit Court should be affirmed.

Respectfully submitted,

EDGAR C. CHAPMAN,

Respondent in person.

December, 1907.